United States Court of Appeals

for the Second Circuit

APPENDIX

74-1203

ORIGINAL

B P/S

In The

United States Court of Appeals

For The Second Circuit

FRANK D. BALECHA,

Plaintiff-Appellee,

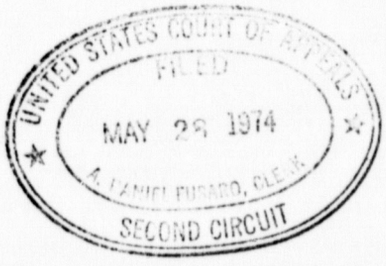
vs.

UNION CARBIDE CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX



HAIGHT GARDNER POOR & HAVENS
Attorneys for Defendant-Appellant
1 State Street Plaza
New York, New York 10004
DI4-6800

JOSEPH FRIEDBERG,
Attorney for Plaintiff-Appellee
299 Broadway
New York, New York 10007
BE3-0101

(7214) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Appendix

Page

Relevant Docket Entries 1a

Transcript of Proceedings Before MacMahon, D. J. on October 1, 1973. . . . . 2a

Transcript of Proceedings Before MacMahon, D. J. on October 2, 1973. . . . . 139a

Charge of The Court 224a

Verdict 239a

Report of Injury Dated March 10, 1973 . . . 241a

Opinion of MacMahon, D. J. Dated January 7, 1974 . . . . . 243a

WITNESSES

Frank Ducusin Balecha:

Direct 11a
Redirect 76a
Cross 78a, 148a

Dr. Harold S. Goldberg:

Direct 47a
Cross 55a

Contents

	Page
Redirect	73a
Dr. Benjamin S. Golub:	
Direct	88a
Cross	103a
Redirect	111a
Dr. Vincent Lodico:	
Direct	112a
Cross	127a, 139a
Redirect	145a
George Doore:	
Direct	180a
Cross	187a
Thomas Britton:	
Direct	188a
Cross	196a
Redirect	198a
Recross	199a

3398-10 SKC

RELEVANT DOCKET ENTRIES

ANN D. [illegible], VS. UNION CARBIDE CORP. 73 CIV. 4368

FILE COPY

DATE	PROCEEDINGS
	RE 3-19-[illegible] JUDGE [illegible]
Nov 15-72	Filed Complaint. Issued Summons.
[illegible]-72	Filed Summons with marshals return. SERVED: UNION CARBIDE CORP. 11-21-72
[illegible]19-72	Filed ANSWER OF DEFT TO COMPLAINT.
[illegible]3-73	Filed stip & order that the time for deft to answer etc, is extended to Jan 29, 1973 acmahon, J.
Jan23-73	Filed stip & order that the time of the deft to object answer etc, is extended to March 1st, 1973. MacMahon, J.
Dec4-73	Filed Notice that Haight, Gardner, Poor & Havens are retained as attys for deft.
Mar.5-73	Filed Interrogatories addressed to Plaintiff.
Mar.6-73	Filed stipulation and order extending defendnata's time to object, answer, etc. to interrogatories to 3/26/73. So ordered. MacMahon, J.
Mar30-73	Filed pltff's Answers to interrogs. ofdeft.
Apr 19-73	Filed deft's answers to Interrogatories propounded to the Pltff.
Apr 6-73	Filed stip and order that the time for the deft. to answer the Interrogatories propounded by the pltff is extended to 4/11/73, So Ordered Mac Mahon J.
May8-73	Filed pltff's motion for discovery ret: 5-11-73.
May8-73	Filed memorandum of law in support of pltff's motion for discovery.
May 14-73	Filed memo endorsed on motion papers dtd. 5/8/73, Motion withdrawn, see letter from Joseph Friedberg, Esq. dtd. 5/9/73, So Ordered Mac Mahon J. m/n
May 18-73	Filed deft's supplemental answers to Pltff's Interrogatories.
Oct. 1-73	Before MacMahon, J.-Jury trial begun
Oct. 2-73	Trial continued and concluded--Jury verdict for pltff.
Oct. 3-73	Filed Judgment #73,806--pltff. have judgment against the deft. in the amount of $18,100.--Judgment entered--Clerk--mailed notice ent. 10-4-73
Oct. 15-73	Filed deft's post trial memorandum pursuant to Rule 59
Oct. 18-73	Filed pltff's memorandum in opposition to deft's motion pursuant to Rule 59
Nov. 16-73	Filed deft's notice of motion for a new trial-ret. on a date & time to be fixed by the court.
Nov. 20-73	Filed transcript of Oct. 1, 2, 1973
Jan. 8-74	Filed memorandum OPINION #40,184--Motion for a new trial is in all respects denied. So ordered--MacMahon, J.-mailed notice
Feb. 5-74	Filed Defendant's Notice of Appeal from the order denying deft's post trial motion to aside the verdict rendered by the jury on October 2-73. m/n

TRANSCRIPT OF PROCEEDINGS BEFORE MACMAHON, D.J. ON OCTOBER 1, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

FRANK D. BALECHA, :

Plaintiff :

vs. : 72 CIVIL 4868 (LFM)

UNION CARBIDE CORP., :

Defendant :

- - - - - - - - - - - - - - - - - - - x

Before:

Hon. Lloyd F. MacMahon,

District Judge

New York, N. Y.
October 1, 1973 - 11.00 A.M.

APPEARANCES:

JOSEPH FRIEDBERG, ESQ.,
299 Broadway, New York, N. Y. 10007
Attorney for Plaintiff
MARTIN LEVINE, ESQ., of Counsel

HAIGHT, GARDNER, POOR & HAVENS, ESQS.,
One State Street Plaza,
New York, N. Y. 10004
STEPHEN C. CARR, ESQ., of Counsel

THE CLERK: Frank D. Balecha vs. Union Carbide Corp. Is the plaintiff ready?

MR. LEVINE: Plaintiff ready.

THE CLERK: Is the defendant ready?

MR. CARR: Defendant ready.

THE COURT: Proceed.

(A jury was duly impaneled and sworn.)

THE COURT: All right, Mr. Levine.

MR. LEVINE: With the Court's permission, Mr. Carr, Mr. Foreman, ladies and gentlemen of the jury, at the beginning of every case the attorneys are given an opportunity known as opening to the jury. The purpose of this opportunity, as I understand it, is to alert you essentially to the broad outline of the case that the respective attorneys intend to prove.

I represent the plaintiff, Mr. Frank Balecha, and it is my intention to prove to you that Mr. Balecha was injured aboard a merchant vessel of the Union Carbide Corporation and that as a result of that injury he is entitled to certain compensation at your hands.

Essentially what happened is this: Mr. Balecha worked in the Steward's Department. A ship is divided into three departments: the Engine Department, which takes care of the engines; the Deck Department, which takes care

of the operation of the ship and the cargo; and the Steward's Department, which takes care of feeding the crew, cleaning up and keeping the quarters in a clean condition.

Mr. Balecha worked in the pantry as a Pantry Utility. The pantry is not the pantry that you know as housewives. It is actually a larger room, where certain stores are kept and where certain things are brought up for distribution to the galley, or the kitchen or the messhall, which is called the messroom.

One of Mr. Balecha's duties as Pantry Utility was to empty a garbage pail located in the pantry, and this garbage pail would be used by not only Mr. Balecha but by the messmen when they brought things in from the messhall. Certain things were deumped in this garbage pail, for instance on the coffee break. The messman, who is in charge of the messhall, would bring the coffee urns into the pantry and clean them in the pantry and dump the excess coffee and the grounds into the garbage can, and various other things were put into this pail. Mr. Balecha's job, one of his duties, was, when he was on duty, to make sure that that was kept empty.

So, at eleven o'clock on March 27, 1972, Mr. Balecha returned to duty. He worked from 6.30 a.m. until 10 a.m. Then he has an hour off. Then he starts at

eleven and he covers, obviously, the lunch hour. Then he takes another hour off and then covers the dinner hour. At eleven o'clock Mr. Balecha returned to the pantry, he picked up certain supplies which were necessary for lunch by going down to the store rooms, then he came up and he cut some of the greens, the celery and things that would be used for salads for lunch, and then he found, looking at the pail, having thrown his vegetable excesses in, cleaned up the coffee cups and things that were left from the coffee break, that his pail was fairly full of garbage, and in accordance with his orders he proceeded to empty the pail.

Now, on a ship you don't just empty the pail, you don't just take it to a r eceptacle and empty it; you throw the contents over the side of the ship. And in order to throw the contents over the side of the ship in the aft section, in the stern section -- if you threw it, obviously, in the front, it might blow back on the ship, so you have to take it in the stern section -- there are two possible ways he can get from his pantry to the stern, the rear section of the ship.

One way would be proceeding from his pantry through the galley, which is the kitchen, out the back door of the galley into the stern section of the ship. This

way he was forbidden to do by the Steward. The STeward is the chief of all the Steward's Department and he is obviously his boss. This way was closed to him. He was told never to use the galley to take garbage, or never to take garbage through the galley. Obviously, for health reasons you don't want any extra garbage in the kitchen.

The second way was to go out through the messhall, the crew messhall, make a left turn, walk to the door at the end of the messhall, then he finds himself in a passageway which leads directly to the aft end of the ship, and this is the way that he normally took hsi garbage out.

On this particular day, as he picked up his garbage and walked out -- and we will show you pictures to show that he has to pass certain appliances in the messhall, one of which is a refrigerator -- he saw a crew messman by the name of Norwood mopping the deck. The crew comes in to eat at 11.30, and the deck is the floor, and this crew messman was mopping the deck of the messhall.

He asked the messman if it was safe for him to proceed, since a wet deck is not the safest position in the world to cross. The messman told him, "I've already mopped in that section. You can proceed."

Now, why was he mopping at 20 after 11? Well,

the reason he was mopping is that the refrigerator, located right in the messhall and right where Mr. Balecha had to pass, had developed a leak about two days before and would leak water which Mr. Norwood, being a very conscientious man, would clean up whenever he saw it. And this is what he was in the process of mopping up at the time.

In any event, he said, "Go ahead. I've cleaned that area." Mr. Balecha started to walk and, unfortunately, slipped on a slippery portion of the deck caused by the ater and the oil from the refrigerator leaking down onto the deck and then onto the --

MR. CARR: Your Honor, I don't like to interrupt Mr. Levine's summation --

MR. LEVINE: It is not a summation.

THE COURT: I thought it was.

MR. CARR: That's what brings me to my feet. And there is also the use of a word here which has not been spelled out in answers to interrogatories, and I don't believe it is properly before the jury.

THE COURT: See if you can just give a brief outline. You'll have a chance to sum up.

MR. LEVINE: All right.

In any event, he slipped, he fell, striking his left shoulder against a bulkhead. He injured his

shoulder. He received certain treatments aboard the vessel and, after a period of about three or four months, aking tried to work with the shoulder paining him on and off, he finally got off the vessel and received treatment at the United States Public Health hospitals here.

He received treatment for a period of time, went back to the vessel, found he still had pain which interfered with his work. He received further treatment, had another period of working and at the present time has gone off the ship for the purpose of this trial.

It is our intention to prove that the condition of the deck was caused by the condition of the refrigerator, which is a matter that is thefault of the ship and the failure of the messman to properly clean, which becomes also the fault of the ship, and as a result of that he was injured and sustained certain losses and will sustain further losses in the future.

If I prove those things, I will come to you at the end of the case and request a judgment in favor of my client for an amount that will compensate him.

THE COURT: Mr. Carr?

MR. CARR: Your Honor, ladies and gentlemen, Mr. Levine has given you a detailed outline of what he expects to prove in this case. The ship comes into court

denying these allegations that he has made, and that's why it is now up to you to sit in judgment and listen to the facts and listen to the evidence as it comes before you, and then you decide whether the negligence of anybody aboard that ship other than Mr. Balecha himself or the unseaworthiness of that particular vessel caused this man's condition.

Mr. Levine mentioned that he expects compensation at your hands, and I would like to clarify something at the outset. You may, as employees on land for various employers, be familiar with the concept of workmen's compensation. Well, workmen's compensation does not apply to seamen. Seamen have something other than that. Seamen have a federal act of Congress called the Jones Act. That Act permits them to come into this court and to sue their employer, which you as shoreside employees cannot do, to sue their employer for injuries sustained on the job resulting from the negligence of the employer or someone employed by the employer, such as a messman, such as a Chief Steward, such as someone like that. But it is a different situation altogether than what you may be accustomed to as shoreside employees.

So that Mr. Balecha comes into court seeking compensation at your hands indeed. But, in order to do that, in order to receive compensation at your hands, he

must prove what he has set out to prove, in other words thta there was someone on this ship who negligently caused him to suffer the injuries he now complains of, or that the ship itself was for some reason unseaworthy.

Now, if he fails to do that, if he fails to impress you that the negligence of one of his fellow employees or the unseaworthiness of the ship caused his condition in his left shoulder, then although he may have been treated for a condition and he may have received this condition on the job, the Judge will instruct you as to your duty, what you must do with this case, and that's precisely why we come into court.

We come into court denying that there was anyone on this ship who was negligent other than Mr. Balecha himself, who walked across this freshly mopped floor. We come into court saying that the SS Carbide Texas City was not an unseaworthy vessel, not even in that area in the messroom where Mr. Balecha was carrying his pail of garbage; not even that area was unseaworthy. And so we deny that Mr. Balecha received the left shoulder condition as a result of these two things which he has set out to prove, and therefore we feel that after listening to all the evidence you will agree that your verdict must be for the defendant. Thank you.

10/1/73

AM
ession

lecha vs.

on Carbide

Civ 4868

GE MACMAHON

JG 1 Balecha-direct

THE COURT: All right, Mr. Levine. Call your first witness.

MR. LEVINE: Mr. Balecha.

- - -

F R A N K D U C U S I N B A L E C H A,

Called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEVINE:

Q Mr. Balecha, what do you do for a living?

A I am a merchant seaman.

Q And for how long have you been a merchant seaman?

A I was a merchant seaman since 1942.

Q And in what departments have you sailed?

A I sailed in engine room in the beginning, then transferred to the steward department.

Q Now, on March 27, 1972, were you employed aboard a vessel?

A Yes, sir.

Q What vessel was that?

A Carbide Texas City.

Q The Carbide Texas City?

A Yes, sir.

Q And what was your job aboard the Carbide Texas

City?

A A pantry utility.

Q And how long had you been working aboard the Carbide Texas City before March 27, 1972?

A I join the shin December 1st, 1970, up to the time I got the accident.

Q From December 1970 until the time of your accident you had worked only aboard the Carbide Texas City?

A Yes.

Q As a pantry utility, who is your boss?

A The chief steward and the Captain.

Q Well, what was the chief steward's name?

A Tommie Britton.

Q And would he be the one who gave you the orders?

A Gave me everything that I should do.

Q As a pantry utility, what were your hours of work?

A I start 6.30 to 10, got a break --

Q That is 6.30 in the morning?

A In the morning. Get hour break, go back 11.00 to 1.00 p.m.

Q And what happened at one o'clock?

A Be off until 4.00 o'clock again.

Q And then you went back to work?

A Back to work four o'clock to six.

Q What were your duties? What was the job of the pantry utility?

A I take orders from the chief steward and the Captain: dumping garbages, looking what I need for the meal hour according to the menu, bring up stores, have the pantry nice and clean, scrub the deck, soogey if necessary.

Q . Soogey is washing down the walls.

A Washing the walls with soap and water.

Q With respect to dumping the garbage, what garbage are you talking about dumping?

A The can.

Q Is that the can located in the pantry?

A Yes.

Q Do you have anything to do with dumping the garbage that is in the galley?

A No.

Q Do you have anything to do with dumping the garbage any other place aboard the ship other than the pantry?

A No.

Q Now, with respect to dumping the garbage from the pantry, what, if any, orders did you receive concerning the dumping of the garbage?

A The day I got injured on the ship, the steward instructed me never to go through the galley or the salon mess

to dump the garbage out from the pantry to back aft.

Q And that is the day you got on the ship?

A From the day I got on the ship.

Q He told you never to take the garbage through the galley?

A Never.

Q And the salon mess?

A Yes.

Q Did he tell you to take it through the salon mess?

A No.

Q The salon mess is where the officers eat?

A The salon mess is where the officers eat.

Q What way was left open for you to take the garbage?

A Through the crew mess.

Q From December of 1970 up to the time of this accident did you always follow those orders?

MR. CARR: I object to the leading.

A Naturally.

THE COURT: Let's get to the accident.

MR. LEVINE: Yes, sir.

Q Calling your attention to March 27, 1972, did you have an accident on that day?

A I had.

Q And about what time did your accident occur?

A About 11.20 a.m.

Q And what time had you started working before 11.20?

A Eleven o'clock.

Q And when you reported at eleven o'clock, where did you report?

THE COURT: Tell us what happened to you on that day. How did you get hurt? You say you got hurt.

THE WITNESS: I got hurt.

THE COURT: How did you get hurt? Tell us.

THE WITNESS: I was coming out the pantry. I stop at the pantry. I seen the crew messman mopping up the deck. I says to him, "How in heaven you doing it this time? What are you doing? Are you mopping up again?" That's just like that. He says, "Oh, yes. The deck is wet."

MR. CARR: Objection, your Honor.

THE COURT: Don't tell us what anybody said.

THE WITNESS: "The deck is wet and I have to mop it and dry it. The crew is about to come."

MR. CARR: I move that that be stricken.

THE COURT: Yes. Strike it out.

I asked you what happened, how you got hurt.

THE WITNESS: I slipped --

THE COURT: Disregard what he said about what

somebody told him.

THE WITNESS: I slipped my right foot, lost my balance, bang hard against the door, the bulkhead where the refrigerator is recessed.

THE COURT: And where did you get hurt?

THE WITNESS: My shoulder, sir (indicating).

THE COURT: Indicating his left shoulder.

All right. What happened then?

THE WITNESS: My arm is much shorter than the other one (indicating).

THE COURT: What happened to you after you fell?

THE WITNESS: I got hurt and I wait a few minutes, trying to regain my arms, to exercise, to have my natural motion, because I feel so numb that day.

THE COURT: Did anybody come?

THE WITNESS: The crew messman, he was mopping in there. Then, when I hollered up, that's the time when he come and assist me, grab ahold of me tight and grab my arm, take the garbage can out of my hand.

THE COURT: Did he take you anywhere? Did you go anywhere?

THE WITNESS: He lead me back about a few feet towards the other table and I held on that table, behind the refrigerator where the water was leaking.

BY MR. LEVINE:

Q Now, Mr. Balecha, when you came out of the pantry, was there anybody in the crew mess hall?

A Yes.

Q Who was there?

A Norwood, the crew messman.

Q What was he doing?

A He was mopping.

Q Where was he --

THE COURT: Don't repeat. Don't be repetitive. We had that. Let's move along.

MR. LEVINE: I'm sorry, your Honor. I think it is an important point.

THE COURT: I don't care how important it is. You only do it once, Mr. Levine. Proceed as I direct.

MR. LEVINE: May I have an exception, your Honor?

THE COURT: You don't need to take one. You haven't had to in forty years.

Q In any event, Mr. Balecha, did there come a time after your accident that you went to anybody aboard the vessel for medical attention?

A On board a ship there is no doctor or anybody you could rely, but just a chief mate who will give you some

medication.

Q Did you report your accident to the chief mate?

A That day, no. But I reported to the chief steward the same day, at meal hour, lunch time.

Q Did the chief steward give you any medical attention?

A No.

Q The next day did you report it to the chief mate?

A Not the chief mate. The third mate. I cut my finger on broken glasses in the sink, just before meal hour about 11.15. My finger was bleeding so much, I went amidship looking for the chief mate. I couldn't find him. I knew there is somebody somplace around.

I went up to the bridge. I seen the third mate. He was on the bridge. He couldn't leave the bridge. He told me, "I'll see you after meal hour."

Q Did he do anything for your finger at that time?

A After meal hour --

Q No; at the time you saw him on the bridge.

A No. He couldn't leave the bridge.

Q Did he do anything for your shoulder at the time you saw him on the bridge?

A No.

Q Did you see him after meal hour?

A I seen the third mate after meal hour and reported my accident the previous day.

Q Did he do anything for your finger after meal hour?

A Yes.

Q What did he do?

A He give me bandage and bandaged him up, and a rubber glove.

Q Did he do anything for your shoulder after meal hour?

A No. He gave me medication. He gave me Ben Gay to rub my left shoulder.

Q How did you feel during the day from the time of your accident until you saw the third mate the second day?

A Kind of painful, but I could go on with my work.

Q And when you got the Ben Gay, did you use it?

A I used it.

Q Did you ever get any more treatment for your finger?

A Yes.

Q What about your shoulder? Did you ever get any more treatment foryour shoulder?

A The mate gave me medication, sometimes twice a week he gave me Ben Gay, liniment, and sometimes I had sun

bath on open deck. If thesun was good, sun bathing give me more relief, just like the Ben Gay. And, besides, I get electric pad to put on my shoulder when I feel so much pain.

Q Were you able to continue working?

A I continue working.

Q Did you ever discuss with the mate the nature of the injury to your shoulder, what it was?

A Yes.

Q Can you tell us what you said and what he said?

A The mate told me in the beginning just only a muscle pain that would go away. That's what I had been doing, having some Ben Gay and exercising and some electric pad on it, special at night.

Q Did it go away?

A I would have good days, I would get bad days.

Q Did there come a time when you sought further medical treatment beyond the Ben Gay that the mate was giving you?

A Yes.

Q Tell us, what was the occasion of seeking further medical treatment?

A My shoulder bothering me.

Q Was it bothering you more than it had been bothering you before?

JG 11 Balecha-direct

A I couldn't stand the pain in my back. I couldn't raise up my arm.

Q And what did you do?

A About three months later I went up to the Marine Hospital.

Q Was it three months after the pain got very bad or was it three months after --

A It was getting worse and worse.

Q I'm sorry?

A Worse and worse.

Q And you went up to the Marine Hospital.

A I went up to the Marine Hospital.

Q Where was the Marine Hospital?

A In Staten Island.

Q I show you this photograph, Mr. Balecha, and ask you if this photograph is a reasonable representation of the crew mess hall of the SS Carbide Texas City as it appeared on March 27, 1972.

A Is the crew mess hall.

Q Does it look like that, or did it look like that?

A This is the crew mess hall.

MR. LEVINE: If your Honor please, I offer this photograph.

MR. CARR: No objection.

JG 12 Balecha-direct

THE COURT: Received.

xxx (Plaintiff's Exhibit 1 was received in evidence.)

Q Mr. Balecha, can you point out on Plaintiff's Exhibit 1 in evidence the place where you slipped?

MR. CARR: Your Honor, may I approach the witness stand?

MR. LEVINE: I have no objection.

THE COURT: It is a little unusual. Why?

MR. CARR: I just want to see what the witness is going to do on this photograph.

MR. LEVINE: I am going to have him put a circle on the portion of the photograph --

THE COURT: Let's get the question.

Q Will you circle, put a circle, where you were when you slipped?

A (Marking).

Q Now, Mr. Balecha, after you slipped, what, if anything, did you notice about the deck in the area where you have just placed the circle on Plaintiff's Exhibit 1?

A When I went back to pick up the garbage after I slipped, I bend down to pick up the garbage can, I saw a skid mark, and the skid mark is about a foot and a half and kinda dark.

Q Did you at that time notice the condition of the deck around the skid mark?

A It was nice and clean, very clean.

Q Could you tell, Mr. Balecha, from looking at the skid mark, what caused the skid mark?

A The water. There is water under the refrigerator and the water drop off on the motor. Naturally the motor got wet, with that water coming out under the Frigidaire.

MR. CARR: I didn't get that, your Honor. I would like to have it read back, if I may.

THE COURT: Would you read it, please?

(Answer read.)

Q And what would happen to the water when it came off the refrigerator?

A Flows out under the refrigerator.

Q Mr. Balecha, calling your attention again to Plaintiff's Exhibit 1, can you see the refrigerator in that exhbiit?

A Right there (indicating). Here is the refrigerator.

Q Would you put an R on the r efrigerator?

A (Marking).

Q One other question with reference to Plaintiff's Exhibit 1. Mr. Balecha, when you came out of the pantry,

can you tell us, does Plaintiff's Exhibit 1 show where Mr. Norwood was mopping at the time you came out? Does it show it? Just answer that. Does it show it?

A Yes, it shows where he was mopping.

Q All right. Would you put an M where Mr. Norwood was mopping?

A The letter N (marking).

Q Mr. Balecha, had you ever noticed the refrigerator leaking prior to March 27, 1972?

A Yes.

Q And when was the first time you had noticed that?

A Two days before the accident happened.

Q When it leaked the other time or times when it leaked, where would the water accumulate?

A It flows out in the mess room.

Q Into the mess room?

A Into the mess room.

Q All right. Now, in any event, Mr. Balecha, there came a time in July of 1972 when you asked for and received a Master's certificate?

A I went up to the Marine Hospital.

Q In order to get to the Marine Hospital you must get a Master's certificate?

A I get a Master's certificate from the mate.

Q And that's the authorization for you to go to the Marine Hospital.

A Yes.

Q And you received a Master's certificate and you went to the Marine Hospital in Staten Island.

A In Staten Island.

Q What did they do for you there the first time they saw you?

A I went up there. They gave me appointment. No, they gave me pain killers, pills, pain killers.

Q Pain killers.

A Pain killers.

Q Did they examine you?

A No. They gave me appointment on the 18th to see the specialist.

Q They gave you an appointment for the 18th?

A For the 18th, to see the specialist.

Q When they got done with the work they did on July 10th, were you given a slip which indicated whether you were fit or not fit for duty?

A No fit for duty.

Q You were not fit for duty?

A No fit for duty.

Q And did you then return on the 18th of July?

A On the 18th, yes.

Q What were you complaining about when you went in on July 10th?

A My shoulder. My left shoulder.

Q And on the 18th of July what were you complaining about?

A The same.

Q And did they give you an appointment on July 18th to see the specialist in the orthopedic clinic on August 7th?

A In the Marine Hospital I --

Q Yes or no. Did they tell you on July 18th that you had an appointment to see the specialist in the orthopedic clinin on August 7th?

A Yes.

Q And did they give you another slip indicating fit or not fit for duty on July 18th?

A Yes.

Q What kind of slip did you get?

A No fit for duty.

Q Not fit for duty. Now, did they give you any more pain killers on July 18th?

A No.

Q How did you feel during the week from July 10th to the 18th?

A My shoulder is so painful.

Q And between July 18th and August 7th, how did you feel?

A Bad.

Q What, if anything, did you do aboutit?

A I was looking for someone to give me any treatment, some kind of treatment. I went up to NMU at 17th Street, what do you call it --

Q The Health Clinic?

A The health clinic on 17th Street, hoping they could give me any kind of treatment.

Q You said the NMU. That is the National Maritime Union, is it?

A The National Maritime Union.

Q And is that the union you belong to?

A I belong to.

Q Did they give you any treatment at the NMU Health Clinic?

A No.

Q Did they indicate to you whether or not they were equipped to give you any treatment?

A They told me that is only for examining and checking up, no treatment.

Q In any event, when was this that you went to the

Health Clinic, do you remember?

A About July 28th or 29th of July, 1972, something like that.

Q Sometime in July 1972.

A Late July, the 28th.

Q Not having been able to get any treatment over at the Health Clinic, what did you do?

A I seen a doctor.

Q What doctor did you see?

A I seen Dr. Goldberg, at 14th Street.

Q Was Dr. Goldberg your private physician before this accident?

A No.

Q Had you ever met Dr. Goldberg before this accident?

A No.

Q How did you come to go to Dr. Goldberg?

A I seen a seaman I used to know years ago in 17th Street, the NMU, and he recommended me to Dr. Goldberg, that he was good for massaging, and he has told me that Dr. Goldberg had helped him, the same problem I had been having.

Q Did you go to Dr. Goldberg?

A I seen Dr. Goldberg, yes.

Q And what did Dr. Goldberg do for you when you saw him?

A Dr. Goldberg gave me heat, massaging, exercises and pain relievers.

Q You went to him during the period from July 18th through August 7th?

A To August 7th.

Q And then you went back to the hospital?

A After that.

Q And did you see Dr. Goldberg after August 7th?

A No.

Q When you went back to the hospital on August 7th, what did they do for you?

A They sent me to Houston and Varick Streets.

Q Is that the United States Public Health Out-Patient Clinic?

A Yes.

Q What used to be known as Hudson and Jay?

A Hudson and Jay.

Q And did they give you an appointment over there?

A Yes.

Q And what was the purpose of sending you to Houston Street?

A For treatment.

Q What kind of treatment?

A Massaging, exercises and a heat treatment.

Q Is that essentially the same type of treatment that Dr. Goldberg was giving you?

A Yes.

Q By the way, did you receive a bill from Dr. Goldberg?

A Yes.

Q And did you pay that bill?

A I paid Dr. Goldberg.

Q The treatment you get over at the Public Health in Staten Island and Houston Street, that is free, isn't it?

A That is free.

Q In any event, they entered into a series of treatments over at Houston Street?

A I beg your pardon?

Q I said, they gave you a series of treatments over at Houston Street?

A They gave me treatment over three months.

Q And did there come a time on October 26, 1972 when you were marked fit for duty by the Staten Island Hospital?

A Yes.

Q And up to that time you received your treatments at Houston Street and examinations at Staten' sland, is that correct?

A I didn't get you.

Q Between July and October 26th you received your treatments at Houston Street and your examinations at Staten Island, is that correct?

A After I seen Dr. Goldberg.

Q Yes. Is that correct, sir?

A That's correct.

MR. LEVINE: If your Honor please, at this time I offer Plaintiff's Exhibits 2, 3 and 4 for identification into evidence, Plaintiff's Exhibit 2 being the records of teh United States Public Health Service for Staten Island covering the period from July 10 to October 5, 1972; Plaintiff's Xxhibit 3 the Out-Patient Clinic records of Houston Street covering August and Spetember 1972; and Plaintiff's Exhibit 4 the records of Staten Island covering the period October 5th through December 6 of 1972.

MR. CARR: No objection.

THE COURT: Received.

(Plaintiff's Exhibits 2, 3 and 4 for identification were received in evidence.)

xxx

Q On October 26th you were marked fit for duty?

A Yes.

Q Did you then return to work?

A I went back to work.

Q Aboard what vessel?

A The Texas City.

Q The same vessel you were on before?

A Yes.

Q What was your job?

A The same job.

Q And what, if anything, did you notice about yourself when you went back to work?

MR. CARR: I object to the form, your Honor.

THE COURT: Sustained.

Q Were you able to do your job as well when you went back to work after October 26th as you had been before March 27, 1972?

A I was able -- I god good days, I got bad days.

Q When you had a bad day, what, if anything, bothered you?

A The doctor gave me pills.

Q What bothered you?

A My shoulder bothers me.

Q Which shoulder?

A My left shoulder.

Q And did you go back to the Staten Island Hospital in December of 1972?

A I went back.

Q And what was the purpose of your going back?

A I run out of pills, to relive my shoulder.

Q And did they give you more pills?

A They gave me.

Q And you went back to the ship?

A I went back to the ship.

Q Have you worked on the ship steady ever since that time?

A I rejoined the ship January 2, 1973, up to March 11th.

Q What happened then?

A During this period I had another accident.

Q What was the nature of this accident that you had?

A Fractured a finger.

Q How did it happen, Mr. Balecha? What were you doing at the time of the accident?

A Around four o'clock I went down to the store room to get some stores for the evening meal hour.

Q And what happened?

A As I was coming out the chilly box, I get the basket with my left hand. I walk out through the door, turn off the door latch, step down from the chilly box. As soon as I stepped down, the ship come into its full port-side list. I couldn't control the door with one hand --

Q Which hand were you holding the door with?

A With my right hand. I put the basket down and put my shoulder against the door.

Q What shoulder?

A My left shoulder, to hold the door from closing to me.

Q What happened?

A As soon as I put my shoulder against the door, my left arm went numb.

Q Did you feel any pain at that time?

A I never have a pain like my left shoulder before. It went numb, perfectly numb.

Q And what happened then?

A I let it go, and my finger was caught by the door, I don't know how I get hurt, and fractured my finger, almost chop off.

Q And did the door come in contact with your left shoulder?

A I press the door in order to hold it, but my

right hand, one hand, couldn't control the door because the door is swinging back on port side list.

Q Your arm went numb when your shoulder came in contact with the door?

A I put it as I did so many, many times on other ships. But as soon as I had my left shoulder against the bulkhead, my left arm went numb.

MR. CARR: Could I have that answer back, please?

(Answer read)

Q Had you ever done the same maneuver on other ships?

A Yes, sir.

Q Had you ever had a-y problems with it when you did it?

A No, because my arm was strong them days.

Q Had you ever done that maneuver from the time of your accident of March 27, 1972 up to the time you did it in March of 1973?

A No.

Q I show you, referring again to Plaintiff's Exhibit 1 in evidence, a photograph and ask you if this photograph is a photograph of the door that you were talking about against which you put your left shoulder.

A Yes.

Q And is that the door in the closed or open position?

A Open position.

MR. LEVINE: If your Honor please, I offer this photograph as Plaintiff's Exhibit 1A.

THE COURT: Is it marked?

MR. LEVINE: It has been marked Plaintiff's Exhibit 1, the entire folder of photographs.

THE COURT: All right.

(Plaintiff's Exhibit 1 was received in evidence.)

xxx

Q About how much did that door weight, Mr. Balecha?

A Well, the door might be five hundred pounds, if you ask me, a heavy door.

Q Did you receive any treatment aboard the vessel at that time?

A Yes.

Q Who gave you the treatment?

A The mate.

Q And when the vessel landed, did you receive a Master's certificate?

A Yes.

Q And did you go back to the hospital?

A I went to Galveston, Texas Marine Hospital, in Galveston, I mean.

Q I'm sorry?

A Marine Hospital in Galveston, Texas.

Q And what did they do for you in the Marine Hospital in Galveston, Texas?

A Gave me no fit for duty, but fit to travel.

Q Fit to travel?

A Fit to travel, that's right.

MR. LEVINE: At this time I offer in evidence Plaintiff's Exhibit 7 for identification, the Public Health Hospital record of Galveston, Texas, March 12, 1973.

THE COURT: Received.

(Plaintiff's Exhibit 7 for identification was received in evidence.)

xxx

Q Mr. Balecha, you were marked not fit for duty at that time.

A Yes.

Q Did you then go to the public Health Hospital in New York?

A I came home. When I got in, I went to the Marine Hospital.

Q Did you first go to Houston Street?

A No. Marine Hospital in Staten Island.

Q And what did they do for you there?

A They gave me medication for my fingers, an appointment to go back at Hudson and Jay Dispensary.

Q And what were they treating over at Hudson and Jay?

A Massaging.

Q For what portion of your body were they treating you?

A My left shoulder.

Q Were they also treating your finger?

A No.

Q They didn't treat your finger?

A They give me medication, they give me water. Twice a day they give me some solution to soak my finger, my fractured finger.

Q And did they then keep you under treatment until May 10th, 1973?

A Yes.

MR. CARR: For what condition, please? I'll object to the question.

Q For the shoulder.

A Yes.

Q During that time you had a series of treatments to your shoulder.

A Yes.

Q And then you were marked fit for duty for your finger on May 23, 1973.

A Yes.

Q And you went back to work?

A Yes.

Q By the way, when you went back to work, with respect to your shoulder, before you went back to work, had you discussed with the hospital or had the hospital discussed with you any further treatment to your shoulder?

A The specialist speculated to give me some operation in my left shoulder if there is no any way to --

Q Not any improvement?

A If there is any way of improvement. Or he told me, "We are going to put you on a table. We are going to

rotate your arm, loosen up," he said.

Q And this was in May of 1972?

A '73.

Q And did you go back to work?

A I went back to work.

Q Tried?

A Back to work, try.

Q Did you subsequently have a return appointment in three months?

A The specialist told me to be back within ninety days, yes.

Q And did you go back on September 21st?

A I had worked a little longer, try to speculate my left shoulder. But when the pain comes up worse and worse, I had to get up.

Q And you went back to the hospital and were reexamined --

A Yes.

Q -- by the specialist.

A Yes.

Q Was that on September 26th of last month?

A Yes.

Q And at that time did they then discuss again with you the possibility of surgery or manipulation?

A The specialist told me that I have to learn how to live with my injury, that there is no cure: it could be a success, it could be not; I could be crippled for live.

Q You said it could be a success?

A It could be a success, it could be not.

Q A success, is that word you are saying, success?

A Yes. "But the more you get your arm be operated, he said, you lose the movement of all muscles. It is not recommended. I don't recommend any surgery in your shoulder because you could be crippled for life."

Q And that was on last week?

A Last week.

Q And that was the specialist over at the Public Health Hospital?

A Right.

MR. LEVINE: If your Honor please, at this time I offer in evidence Plaintiff's Exhibits 5, 6 and 8 for identification, being, Exhibit 5, hospital record Staten Island March 15th through 21st of '73, Exhibit 6 being the balance of the Out-Patient Department records from August of '72 through May 6th of '73; and Exhibit 8 being the Out-Patient records of Staten Island Hospital March 21, '73 through September 26, '73.

THE COURT: Received.

JG 32 Balecha-direct

(Plaintiff's Exhibits 5, 6 and 8 for identification were received in evidence.)

xxx

BY MR. LEVINE:

Q Mr. Balecha, prior to, before, March 27, 1972, did you ever have any trouble with your left shoulder, to your knowledge?

A No.

Q Mr. Balecha, did there come a time -- withdrawn.

When did you report your accident to the mate on the Carbide Texas City?

A The 28th.

Q And did there come a time after March 28th when someone aboard the Texas Carbide City prepared a report of the accident and told you to sign it?

A They made me sign my Master's certificate.

Q I'm talking now about a report. Is this your signature (handing)?

A Yes.

Q All right. Is that a report that you signed aboard the Texas Carbide City?

A Yes.

MR. LEVINE: If your Honor please, at this time I offer in evidence a report of injury as prepared on the form of the SS Carbide Texas City, signed by Frank D. Balecha,

prepared and signed by a G. I. Doore, Second Mate, and countersigned by T. H. McBane, the Master of the vessel.

THE WITNESS: McBane.

Q McBane.

A McBane.

MR. LEVINE: That report having been furnished by the plaintiff to the d efendant pursuant to a notice having been served upon them.

MR. CARR: Do we have the date of the report, your Honor?

THE COURT: Could you help us?

MR. LEVINE: The report is dated July 6, 1972, according to what is typed here.

THE COURT: Thank you.

MR. CARR: No objection.

(Plaintiff's Exhibit 9 for identification was received in evidence.)

xxx

MR. LEVINE: With the Court's permission, I would just like to read from Plaintiff's Exhibit 9 for one moment.

I am reading now from the report --

THE COURT: You are reading Exhibit 9. Proceed. Read it.

MR. LEVINE: "Investigative Report," the bottom

portion:

"This section to be completed whenever an accident or injury is reported."

In print it says: "What was the injured person doing at the time of the accident, including equipment involved?" And typewritten it says: "Man was carrying garbage pail from pantry to the fantail to dump it. He was passing through the crew messroom."

In printing again: "What unplanned occurrence caused injury?" And in typing: "The man slipped on the deck, which was wet but mopped over and slippery."

In printing again: "What did injured or other person do or fail to do which caused the accident?" And in typing: "Man did not notice that deck was wet."

And in printing again: "What is being done to prevent a repetition of this accident?" And in typing: "The refrigerator has been fixed and the deck no longer is wet during working hours."

Q When you came out of the pantry, Mr. Balecha, and you saw Mr. Norwood there, what, if anything, did you do?

A I stopped.

Q Did you have a conversation with Mr. Norwood?

A Yes.

Q After the conversation was completed, what did you

do then?

A After I asked him what he was doing, I asked him if I could go through.

Q Did he tell you whether you could go through or not?

A Yes.

Q What did he say to you with respect to that?

MR. CARR: I'll object to what he said, your Honor.

THE COURT: Yes. Sustained.

Q In any event, he told you to go through?

THE COURT: No.

MR. LEVINE: I'll withdraw that. I'm sorry, your Honor.

Q Before you went through, what did you do then?

A I slipped.

Q Well, before you slipped, what did you do?

A I start to walk.

Q Before you started to walk, what did you do?

A I asked Norwood if I could get -- is it all right for me to get through, is this okay.

MR. CARR: No. I'll object to the conversation again, your Honor.

THE COURT: Yes. Sustained.

MR. LEVINE: I have no further questions.

THE COURT: Cross examine.

MR. LEVINE: If your Honor please, may we approach the bench?

THE COURT: No, not at this time.

Cross examine.

MR. CARR: Sir, there is a doctor in court and I'll suspend cross, if you wish.

THE COURT: Do you want to put the doctor on out of order?

MR. LEVINE: Yes.

THE COURT: All right. Fine.

(Witness temporarily excused)

MR. LEVINE: Dr. Goldberg

- - -

D R. H A R O L D S. G O L D B E R G,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEVINE:

Q Sir, will you tell us the nature of your profession?

A I am an osteopathic physician in the practice of medicine and surgery.

Q And are you admitted to practice in the State of New York?

A I am.

Q When were you admitted?

A In 1944.

Q Where do you have an office? Do you have an office for private practice of your profession?

A At 320 West 14th Street, New York City.

Q Doctor, in connection with the practice of your profession, can you tell us, aside from your school training, what training you had after you finished with medical school?

A Yes. I am a graduate of the Philadelphia College

of Osteopathic Medicine and Surgery in 1944, licensed to practice medicine and surgery in New York State in 1945. I am certified by the American Osteopathic Board of Physical Medicine and REhabilitation as a specialist in that field.

THE COURT: Perhaps, with that introduction, Mr. Carr, would you concede his qualifications?

MR. CARR: Yes, sir.

THE COURT: All right. Proceed.

BY MR. LEVINE:

Q Doctor, did there come a time in July of 1972 when you examined Frank D. Balecha?

A Yes.

Q And can you tell us, doctor, what was the nature of your examination?

A I examined Mr. Balecha for complaints of pain in his left arm and shoulder. The examination took place on July 20, 1972.

The examination revealed atrophy of the left arm and shoulder - that is, weakness and wasting of the muscles about the left upper arm and the shoulder. And there was painful restriction of the left arm on abduction, that is, on raising it to the side and up to 40 degrees; on anterior elevation, that is, in raising the arm forward up to 70 degrees; on internal rotation, that is, on twisting

the arm internally, and on external rotation, turning the arm outward to three-fourths of the normal range.

The patient was unable to reach behind his right collar bone with his left shoulder, whereas normally one could reach far behind and touch the shoulder blade. And in attempting to put his left hand behind his back, he could not reach beyond his left hip, whereas normally we could go all the way over to the right side.

The left arm measured at the axilla - that is, at the armpit - 11 1/2 inches in circumference as compared to a 12 inch measurement on the right, so that there was a half inch difference in the muscle mass of the left arm.

At the elbows both measurements were equal. And I took X'rays of the shoulder.

Q Doctor, based upon your examination, were you able to, or did you, come to a diagnosis?

A I did.

Q And can you tell us, doctor, what was your diagnosis at that time?

A The patient had an adhesive capsulitis of the left shoulder, or a frozen shoulder.

Q Will you tell us, doctor, what is an adhesive capsulities?

A The shoulder consists of the humerus, or the bone

that makes up the arm, and the scapula, which is the shoulder blade portion of the shoulder joint. This shoulder blade portion has a socket in which the head of the arm, or the head of the humerus, fits. So that we have a ball and socket joint, with the arm moving against the ball.

In order to hold this ball into the socket, there are ligaments, or a capsule, which is a fibrous tissue which goes from the top of the cup, or the ball, and attaches to behind the head of the humerus so as to h old it together. It is a loose joint, but it is freely ovable and supported in part by this capsule.

The capsule is smooth, it is moist, to allow for motion which is free of friction, and thereby enables motion. On top of the capsule there are muscles, muscles which come from across the chest to attach to the capsule, helping it to turn; there are muscles which come from above the shoulder to raise the arm; there are muscles which come from behind the shoulder which turn it outward. All of these muscles attach to this capsule, giving it strength and allowing it to support the arm and to move the arm.

When that shoulder capsule becomes inflamed, it starts to secrete fluid, and this fluid then becomes

thick and sticky and causes adhesions, similar to adhesions following operations where an appendix is removed or abdominal surgery. Adhesions are tight fibers which constrict and prevent full motion.

Q Now, doctor, I want you to consider that on March 27, 1972 Mr. Balecha was aboard a merchant vessel, that he slipped, striking his left shoulder against a bulkhead, that he experienced a pain in the shoulder which did not go away and he was treated aboard the vessel with the use of Ben Gay.

I want you to consider that he contined aboard the vessel doing his work, having good days and bad days, the bad days being when his shoulder became painful; that the condition of pain persisted and that the treatment continued to be Ben Gay until July 10, 1972, when he was examined at the Public Health Hospital, wherein the report states, and I am reading now from Plaintiff's Exhibit 2 in evidence:

"Plaintiff allegedly bumped left shoulder when he fell while aboard a ship. This accident was supposed to have occurred on March 28, 1972. Since that time he has continued to work with much difficulty. About two weeks ago left shoulder really became stiff and painful."

MR. CARR: Your Honor, I dispute that interpretation of the record.

Q Doctor, I withdraw that. Are you familiar with medical terms?

A I am.

Q Can you tell us what is this term located on the fifth line, a C with a line over it?

A That means "with".

Q What is the sign for "without"?

A S.

Q An S with a line?

A An S with a line, from the Latin sine, meaning without. C is from the Latin word cum, which means "with" and is written in medical terminology as a C with a line over it.

MR. CARR: I can't question now.

Q In any event, "PE," what does that mean?

A Physical examination.

Q "Abduction of the left shoulder" -- again C with a line over it, "with" --

A Yes.

Q -- "discomfort over deltoid muscle." What is the deltoid muscle?

A The deltoid muscle is the muscle on the outer,

upper surface of the shoulder.

Q Doctor, at that time he was given another appointment for one week later, and X-rays were taken, which revealed no fractures.

One week later, on July 18th, the hospital record indicates that patient continues to have pain and discomfort and he claims not to be able to abduct left s houlder greater than 60 degrees.

Thereafter, doctor, you saw him on the 20th, was it?

A Yes.

Q Now, doctor, I ask you to assume the accident which I have described to you, the treatments that he had received prior to seeing you on July 20th, and ask you whether you can state with a reasonable degree of medical certainty whether or not the accident that I have described is a competent producing cause of the condition you found on your examination of July 20, 1972.

MR. CARR: Objection, your Honor.

THE COUPT: Overruled.

A Yes, I can.

MR. CARR: Can I state the basis for my objection?

THE COURT: Not now.

Q And, doctor, was theaccident a competent producing cause of the injury?

A Yes.

Q Or the condition you found?

A Yes.

THE COURT: We'll take our luncheon recess until two-fifteen. Don't talk about the case and don't let anybody talk about it with you.

I'll hear you in a minute, Mr. Carr, as soon as the jury has left the room.

(The jury left the courtroom.)

THE COURT: All right, Mr. Carr.

MR. CARR: Your Honor, I would object to the hypothetical on the grounds that Mr. Levine did not include in his statement of facts the testimony of Mr. Balecha that he had had no previous trouble with his particular shoulder.

THE COURT: I think you should amend your question.

MR. LEVINE: All right, your Honor. I will amend it.

THE COURT: All right.

(Luncheon recess)

- - -

JG 1

CROSS EXAMINATION

BY MR. CARR:

Q Dr. Goldberg, you are not a medical doctor, are you?

A I am.

Q You are?

A I am.

Q What is the distinction between a medical doctor and an osteopath?

A The term is osteopathic physician. We are both licensed to practice medicine and surgery. We each go through the same number of hours of medical --

THE COURT: Are you an M.D., doctor?

THE WITNESS: No. I am a D.O.

THE COURT: You are not a doctor of medicine.

THE WITNESS: No. I am a medical doctor but not a doctor of medicine. I am a doctor of osteopathic medicine.

Shall I pursue the difference, your Honor?

THE COURT: No. Nobody asked you what the difference was.

THE WITNESS: Oh, he did. I'm sorry.

Q You were telling us the similarities. Can you tell us what the differences are?

A The difference is this: The M.D. treats of the body as a physiological organ, using drugs, medicines and surgery. The osteopathic physician treats of the body as a physiologic as well as a structural unit, using drugs, medicine, surgery and manipulation. So that we have an additional method of treatment which the M.D.'s do not use, and that is manipulation. So that we use drugs, medicine, surgery and manipulation.

Q Did you use manipulation in Mr. Balecha's case?

A I did.

Q Was that done under anesthesia?

A No, that was not done under anesthesia.

Q Now, you noted in your report, I think the first time you saw him, that there was some atrophy of the left arm.

A Yes.

Q Would you tell me where you found atrophy of the left arm?

A Yes. At the armpit. It was of the biceps brachiae muscle.

Q Is that the large muscle in this part of the arm up here (indicating)?

A It is. And also there was atrophy of the deltoid, which is the muscle that comes across over the front and

side of the shoulder.

Q Is that measurable?

A It is measurable as a unit, not as an individual muscle.

Q Did you make some kind of a measurment of the deltoid muscle?

A No. I made a measurement of the circumference of the arm.

Q The circumference of the bicep at the armpit, is that the measurement you used?

A No. I made a measurement of the arm, which is all of the muscles that are present at the armpit, one of which is the biceps.

Q Now, was Mr. Balecha left or right handed?

A I don't know if I have a mention of that. I will see.

I do not know.

Q Would that be of any significance to you in taking measurements of a man's arm?

A It would.

Q Would you expect to find muscles more developed on the right side than on the left side?

A Yes.

Q In a man who does manual work?

A Yes.

Q And you don't know to this day whether Mr. Balecha is right or left handed?

A I do not.

Q Now, you asked him to perform some tests, I believe.

A Yes. That is correct.

Q These tests, once again, you described as abduction and rotation.

A Elevation.

Q And elevation. Are these tests in some measure dependent upon the patient's cooperation?

A They may be.

Q They may be.

A Yes.

Q So that if you asked the patient to raise his arm to a certain level, is that the way you conduct the test?

A No.

Q Tell me how you conduct the test.

A I stand in front of the patient and I tell him to raise his arm at the side while I follow the movement of his arm to see whether or not he suddenly stops motion, whether he restricts motion, whether he is trying to feign limitation of motion.

I also observe the patient's expression to see

whether or not there is an expression of pain. I observe other muscles in the patient's body to see whether he is guarding or stopping motion voluntarily, so as to determine the objectivity of the test and to eliminate as much as possible the ability of the patient to voluntarily restrict motion.

Q You mentioned the objectivity of the test. What do you mean by that?

A There are, in examining, subjective and objective findings. The objective findings are those findings in the examination of a patient over which the patient has no control. The subjective findings are merely complaints, when the patient says he has pain or it is stiff.

In evaluating patients, we hope to eliminate the subjective complaints. We don't want to be influenced by what the patient tells us. We want to see exactly what is present in the part that we examine. And so we examine every patient with a view to eliminating these and we look for wilful guarding, deliberate attempts to restrict motion so that when an examination is made I can report the exact condition as I find it.

Q As best you can, given the fact that the test to some extent is a voluntary test and one over which the patient has some control.

A Well, there are others. There are involuntary tests too which I conduct.

Q All right. What is the voluntary part of the test that you conducted with Mr. Balecha?

A The patient is asked first to abduct his arm (indicating) - that is, to raise his arm. He raises it to a certain extent, at which --

Q Do you consider that one of the voluntary tests?

A That is a voluntary test. That is an active test on the part of the patient.

Q All right. What are the involuntary parts of that test?

A Then, after we go through the ranges of motion that I have discussed - that is, abduction, raising the arm to the side; elevation anteriorly, raising the arm forward as far as he can; and internal rotation and external rotation, then carrying the arm across the chest to see how far it can be brought, putting it behind one's back - then, after the patient is asked to perform these tests, I duplicate these tests with the patient at rest so that he has no control over the motion.

Q All right. Do you indicate in your report whether the tests you conducted were passive or active?

A These are the results of both my active and passive

tests.

Q Do you indicate in your report whichresults were passive and which results were active?

A No, I do not.

Q And, once again, the active tests are the ones over which he does have some measure of control.

A That's correct.

Q Now, after you asked him to put his arm through the various ranges of motion, what other test did you conduct?

A Then I measured the arms, I felt the shoulder and measured his arms, at the axilla - that is, at the armpit - and at the elbow.

Q What difference would you expect to find in a right anded man who performs manual work between the measurement on the right bicep and the measurement on the left bicep?

A From an eighth to a quarter inch in circumference.

Q No more than a quarter of an inch?

A No more than a quarter of an inch. A quarter of an inch would be maximum, usually about an eighth - if you were left handed, that is. If you were right handed, then of course there should be a comparable difference.

Q You took some X-rays.

A I did.

Q Do you have them with you?

A I do.

Q May I see them, please?

A (Handing)

(Pause)

Q What were your findings with respect to the X-ray -- Is this an X-ray of Mr. Balecha's left shoulder (indicating)?

A Yes. It is negative for fra cture or dislocation, and there is roughening at the greater tuberosity.

Q What does that mean, roughening at the greater tuberosity?

A This is where the tendon is attached, the tendon of the supra spinatus muscle attaching to that portion of the arm, and this is consistent with Mr. Balecha's age.

Q What do you mean by that?

A Well, as we get older we all will demonstrate roughening of that area of the shoulder. It is of no clinical significance.

Q Is that the same kind of finding you would see on an X-ray where there is some arthritis involved?

A No. In arthritis we would see proliferation of bone and projection of bone.

Q Well, when you say projection, is that the same

thing as roughening?

A That would be spurring.

Q Could roughening of the greater tuberosity such as you show on this particular X-ray produce any symptoms in a man?

A No. Roughening per se, no.

Q Roughening per se, no. You are qualifying that.

A Yes, because we can have arthritis and roughening, both. We can just have roughening. But the roughening per se is not pathognomonic of any pathology.

Q What does pathognomonic mean?

A It is not a pathology per se. It doesn't mean, if you see roughening, that there is pain.

Q And by the same token it doesn't eliminate the possibility that where you see roughening there might be pain.

A That's correct.

Q In other words, the roughening could produce pain in some individuals.

A No. There could be pain in addition to the roughening from some other cause.

Q All right. They could be concomitant, in other words.

A That's correct.

Q This roughening that you saw on Mr. Balecha's shoulder, was that in any way related to the accident that he is talking about?

A I don't believe so.

Q You think this was a normal development that accrued over a number of years?

A I do.

Q Did you X-ray the other shoulder?

A No.

Q Did you conduct any arm tests of the other shoulder?

A Yes.

Q Where is that mentioned in yourreport?

A It is not. But it is --

Q It is n ot mentioned in your report.

A No, it is not.

Well, let me see if it is or not.

Yes. I said the rest of the orthopedic examination was negative. So it is mentioned in the other report that there is no pathology in the right shoulder.

Q It does say that in the report, that there is no pathology in the right shoulder?

A I just said that thereport says that the rest of the orthopedic examination is negative. It means therefore that there was no pathology in the right shoulder.

Q Doctor, when you say there was a restriction of motion of 40 degrees on the left side, that is,40 degrees on anterior elevation, that means the arm stopped at about what point, 40 degrees on anterior elevation?

A You measure from the side of the body as zero. Forty degrees would be less than a 45 degree angle, or half way up. So it would be less than half way from the side to the shoulder, to the level of the shoulder.

Q What is a rull range of anterior elevation?

A 180 degrees (indicating). 90 degrees would be at the level of the shoulder, zero being at the side, midway between 45. 40 would be a little less than midway between.

Q In other words, it was about here (indicating) that Mr. Balecha began to complain of pain?

A It is at that level that he was unable to bring it any higher because of the presence of pain and adhesions.

Q So the adhesions aren't shown on that X-ray, are they?

A They are not shown on X-ray; that is correct. That is a clinical diagnosis.

Q Do you have any idea what Mr Balecha's range of motion is in the right arm?

A Yes. It is complete.

Q It is complete. And when you say complete, what

do you mean by that?

A He can raise his right arm all the way up over his head in a straight line. He could bring it forward all the way up.

Q You are talking about capsulitis, which you say -- Tell me again what you mean by capsulitis, if you will.

A It is an inflammation of the capsule of the shoulder characterized by the secretion of fluid, or exudate.

Q Would bursitis cause capsulitis?

A Bursitis is a portion of the capsule. So that a patient may have bursitis or capsulitis or a combination.

Q Well, the bursal sac is part of the capsule.

A Yes.

Q And the man may develop a bursitis condition in the shoulder without any trauma whatsoever, isn't that correct?

A That is correct.

Q Were you able to determine whether this was or was not a bursitis condition?

A Yes. It was my opinion that he had a capsulitis. It was not a bursitis because there was no point swelling as we would find in a bursitis, nor a point tenderness as is found in a bursitis.

Q So you ruled out bursitis.

A I ruled out bursitis.

Q You also mentioned that there was a partial tear of the rotator, or cuff, a partial tear of the cuff of the left shoulder. What is that diagnosis based upon, or is that the same thing as a capsulitis?

A I did not mention it here on the stand. Are you referring to the report I sent, which I have not read? I didn't mention it here.

Q I am looking at your report.

A I did not mention the tear in my testimony.

Q In your testimony today.

A No, I did not.

Q But yet you did in your report.

A In my report I felt that the man had also sustained a tear of the rotator cuff.

Q In your report.

A Yes.

Q Do you feel that way on the stand now?

A I feel that there is a possible tear of the cuff. I could not prove it without surgery, and so I have limited my diagnosis to what I am certain of medically, and that is that he had an adhesive capsulitis.

Q So you are not sure about the tear of the rotator cuff, as you have expressed it in this initial report.

A It would have to be confirmed on surgery.

Q Is that the only way you can confirm a tear of a rotator cuff, by surgery?

A This is the way to prove it.

Q Is that the only way you would make such a diagnosis?

A A complete tear? No. If there was a complete tear, then of course there would be inability to rotate the amr. A partial tear would have to be confirmed by surgery.

Q Based on the man's medical history and his work history since the date you first saw him, what is your belief as to whether or not he sustained a partial tear of the rotator cuff?

A Given his history subsequent to my examination, I do not feel that he sustained a tear of the rotator cuff.

Q In order to sustain a tear of the rotator cuff, what are the mechanics of the injury?

A A direct blow to the attachment of some of the muscles, of the rotator muscles at the shoulder joint.

Q A direct blow.

A A direct blow from a sharp edge.

Q What are the other mechanics of a tear of the rotator cuff?

A A sudden severe stress or strain exerted to the shoulder at certain portions in rotation.

Q All right. Suppose a man falls on his outstretched arm. Is it possible to tear your cuff in that situation?

A He could do it that way too.

Q It is rather common, is it not?

A It is not necessarily common, but it is a way of doing it.

Q What is the most common way in which individuals tear the rotator cuffs?

A Twisting injuries.

Q Twisting injuries.

A Twisting injuries.

Q When you say a twisting injury, does that mean the hand is --

A Is carried forward --

Q -- carried backward or carried forward?

A Mostly carried backward because of the anterior rotators.

Q Mr. Balecha has testified that he had no trouble with his left shoulder prior to this particular incident. Did you question him specifically in that regard?

A I have no recollection of whether I had. I have no record in my history of any prior injuries. I can only that I assume that I had and was given a negative history.

Q You assume you had questioned him?

A That's correct.

Q Because that's an important element in arriving at your diagnosis, is it not?

A It is significant. It is helpful in arriving at the diagnosis, yes.

Q Well, it would make some difference to you, would it not, doctor, in pinpointing March 28th as thecause of all his problems, whether or not he had problems with his shoulder before?

A It would be helpful and it would depend upon the history.

Q And that's a significant part of your history taking from any patient.

A Yes.

Q Did you specifically ask him that question?

A I stand on the answer I gave you. I don't remember. It is my practice and my custom to ask it. I assume I had asked it.

Q Have you reviewed any medical records with respect to Mr. Balecha?

A No, I have not.

Q You have never seen any of the medical records in this case?

A No, I have not.

Q I show you Plaintiff's Exhibit 3 in evidence and ask if you've seen that document before testifying.

A No.

Q What does that document indicate with respect to previous shoulder problems?

A That this man injured his shoulder ten years ago, that he injured it one month ago when he slipped and fell, and that --

Q What is the date?

A May I finish?

Q No. Give us the date of that report you are reading from, and then you can finish.

A 9/7/72.

Q September 7, '72. All right; I'm sorry to have interrupted you.

A "It was recently injured, one month ago, when he slipped and fell. Prior to this time he states that his shoulder was pain free." This is the history. Do you want me to read the rest?

Q No. That is sufficient. Would that have been helpful to you if you had seen that in arriving at your diagnosis?

A Well, that was after I had treated him, so it would

not be of any significance. If I had known that, it would have meant that the patient was pain-free at the time I saw him in July.

Q Well, this says one month ago, and it is dated in September. What does that mean to you?

A That meant that he had -- that his pain started in August, which of course was not consistent with the facts because I had seen him in July.

Q Does it say that his pain started in August or does it say he recently injured his shoulder one month ago?

A Well, I would have to see it again.

Q All right (handing).

A It was recently injured one month ago when he slipped and fell.

Q Did Mr. Balecha tell you about another fall he had had in 1971?

A No, he did not.

Q Would it be helpful to you in your testimony today whether you knew about an injury in 1971 involving the left shoulder?

A It would.

Q Have any records concerning a 1971 incident been shown to you?

A No.

MR. CARR: Nothing further.

REDIRECT EXAMINATION

BY MR. LEVINE:

Q Doctor, referring to Plaintiff's Exhibit 3 in evidence, would you read the first three sentences, please (handing)?

A "Patient states that his left shoulder was initially injured ten years ago. It was recently injured one month ago when he slipped and fell. Prior to this time he states that his shoulder was pain-free."

Q That would mean, doctor, assuming that that report is correct, that in July, when you saw him, he was pain free.

A That's what it would mean, yes.

Q Because this was from September.

A Yes.

Q Now, doctor, would there be any significance as far as your treatment or diagnosis is concerned to the fact that he injured his shoulder ten years prior and had been pain free all that time?

A It would have been of no significance in my diagnosis or in my findings or in my conclusions.

Q And, doctor, would it be of any significance if he had injured his shoulder a year prior and had been pain

free from shortly after the injury until the time of the second injury?

A If there were no symptoms and no restriction, the answer would be the same. It would not affect my diagnosis or the course of his disease.

Q Doctor, I believe you said, in answer to a question by Mr. Carr, that with respect to a rotator cuff tear you would have to establish it by means of an operation.

A I qualified that. A partial tear would be confirmed by surgery. A complete tear does not require surgery for diagnosis.

Q If an examination were held where there was a finding of tenderness over the insertion of the cuff at the greater tuberosity, would that be a clinical sign of a rotator cuff tear?

THE COURT: Would you mind coming up here, please?

(Discussion off the record at the side bar.)

BY MR. LEVINE:

Q Just that one question, doctor.

A No. That is significant of stress, strain and inflammation of the rotator cuff but is not diagnostic of a tear.

MR. LEVINE: I have no further questions, doctor. Thank you.

THE COURT: You are excused, doctor.

(Witness excused)

MR. LEVINE: Mr. Balecha.

- - -

F R A N K D. B A L E C H A, resumed.

THE CLERK: I remind you you are still under oath.

MR. LEVINE: I omitted two things. May I bring them out?

THE COURT: Yes.

DIRECT EXAMINATION CONTINUED

BY MR. LEVINE:

Q Mr. Balecha, I believe you said you started working for the Company in 1970.

A Yes.

Q Now, during the year 1971 did you work steady for the Company?

A Not until about the end of August 1971.

Q And what did you start doing at the end of August 1971?

A I went to school, NMU Upgrading School.

Q That was to get a higher position in the maritime field?

A Yes.

Q And how long did you attend school?

A About the end of August to February 14, 1972.

Q And during that period were you paid by the Company, by Union Carbide?

A No.

Q Now, Mr. Balecha, approximately what do you make, or in June of 1972 what were you making, a month as a Pantry Utility?

A $431, I guess.

Q That's your base pay?

A A a few cents.

Q Do you also get overtime?

A Holidays and Saturdays.

Q And Sundays?

A And Sundays.

Q And over the period of a month working at sea, when you worked for a month, how much did you make?

A About $750, around.

Q And during the period when you were under treatment by the hopsital, following this accident, during the two periods, were you paid for either of those periods?

A I beg your pardon?

Q When you were under treatment by the hospital from July to October of 1972 and in March, April and May of 1973, were you paid for those periods?

A No.

MR. LEVINE: I have no further questions.

THE COURT: All right, Mr. Carr.

CROSS EXAMINATION

BY MR. CARR:

Q You were paid maintenance, weren't you?

A Maintenance?

MR. LEVINE: If your Honor please, I object to that.

THE COURT: Sustained.

Just a minute. Do you make a claim for that?

MR. LEVINE: No, sir.

THE COURT: All right.

MR. CARR: I think I have stamped this. I would like to mark this as Defendant's Exhibit A, defendant's first exhibit.

THE COURT: You were all asked at pretrial to mark your exhibits yourselves. It would save time.

xxx (Defendant's Exhibit A was marked for identification.)

Q I show you Defendant's Exhibit A for identification and ask if you can tell us what it is.

Is that your federal income tax return?

A Yes.

Q Is your signature on the bottom there?

A Yes.

THE COURT: You can put leading questions on cross examination, Mr. Carr.

Q Of what year is that?

THE COURT: Tell him what year it is. That's how you lead him.

Q Is that 1971, your income tax return for 1971?

A Yes.

Q And were your total earnings that year $4,214?

A Yes.

Q And that's the year before the accident.

A 1971?

Q 1971 is the year before this incident you testified about on the Carbide Texas City.

A Yes.

Q And I show you this document, your 1970 income tax return. Does that bear your signature at the bottom?

A Yes.

Q In that year did you make $5,413?

A Yes.

MR. CARR: I've also stamped this.

(Defendant's EXhibit B was marked for identification.)

xxx

Q Did you report making $4,896 in 1972, last year?

A Yes.

MR. CARR: I offer all three documents in evidence.

MR. LEVINE: No objection, your Honor.

THE COURT: Received.

(Defendant's Exhibits A and B for identification received in evidence.)

xxx Q This injury to your left shoulder ten years ago, ould you tell us a little about that, please?

A I don't recall any injury on my left shoulder, but I had in the spine, when I was in the Farrell Line as a storekeeper. No. I was a pantryman that time. Somebody opened the Frigidaire and I was in front of it. The ship had been rolling and somebody opened the Frigidaire to take some butter in it, and the Frigidaire slam on my back, right here (indicating).

Q The door to the refrigerator closed on your back?

A Yes.

Q I am talking about your shoulder.

A I didn't have no injury on my shoulders.

Q Left shoulder.

A I don't recall none, and I never been treated.

Q You told the doctor at the hospital you had an injury ten years ago, Mr Balecha.

A No. On my back.

Q You didn't tell the doctor that?

A No. I don't know any injury of my back, no injury. I never was treated in any hospital nowhere on the shoulder, just my back.

Q I'm not saying you were treated anywhere. I'm asking you if you had an accident such as the one you told the doctor about.

A No.

Q You did not.

A I did not.

Q Did you injure your shoulder up at the NMU?

A No.

Q You did not.

A No.

Q Tell us, Mr. Balecha, what happened at the NMU?

A When I was in school, I slip.

Q You slipped on what?

A I slip on the floor, a wet floor.

Q A wet floor?

A A wet floor. Somebody had spill coffee, and I step on it and fell, and I have my hand like this (indicating), sitting position.

Q In a sitting position.

A On my seat, my arms like that (indicating). I have bruised my --

Q You bruised your forearm.

A I bruised my forearm right in the center (indicating).

Q When you fell backward, did you hurt your shoulder at all, when you fell backwards?

A I never fell backwards.

Q You didn't fall backwards?

A Because I was sitting, I was in a sitting position, like this (indicating).

Q Did you complain to the doctor up at -- is this where you were taking your upgrading course?

A Upgrading course.

Q And this accident happened on land, right?

A Yes, up at 17th Street.

Q Up at 17th Street, at the NMU hall.

A At the upgrading school.

Q And you slipped on a wet floor.

A A wet floor.

Q But you didn't fall backwards; you just fell in a sitting position.

A Yes.

Q Did you complain to the doctor about pain and

tenderness in your left shoulder?

A I didn't complain --

Q Yes or no.

A No.

Q When did that take place, if you remember?

A I believe the second week of September.

Q The second week of September what year?

A 1971.

Q About six months before this incident on the Carbide Texas City, right?

A Over seven months, close to seven months.

Q Close to seven months.

A Yes.

MR. CARR: Your Honor, I would like to offer a portion of the NMU Pension and Welfare records that I have subpoenaed and which Mr. Levine has examined. Instead of offering the whole packet, I would like to offer only two sheets of that packet as Defendant's Exhibit C.

(Defendant's EXhibit C was marked for identification.)

xxx MR. LEVINE: No objection.

(Defendant's Exhibit C for identification received in evidence.)

xxx MR. CARR: With the Court's permission, I would

like to read from these two exhibits.

This is from the NMU pension and welfare plan at 346 West 17th Street. It is entitled "The Medic al Dapartment." It is addressed to the officer in charge of the Public Health Service Clinic, Houston Street in New York City, from the Medical Director at the NMU Clinic. It is dated September 9, 1971, "Subject: Frank Balecha."

"This seaman has been examined on September 9, 1971. He is referred to you for further evaluation of possible multiple injuries. At 9.00 a.m. September 9, 1971 plaintiff slipped and fell on a recently mopped floor here, struck back of head on floor.

"Impression.

"1. Abrasion, contusion left index finger.

"2. Spr ain of the left shoulder.

"3. Possible low back derangement, recurrent.

"4. Observation for possible head injuries.

"5. Observation, pain, lower cervical spine region."

The second sheet is the re cord of a medical visit for Mr. Balecha and it records his chief complaint when he went to see the doctor first at the NMU clinic:

"Patient slipped and fell on f ourth floor here in hallway outside dining room. Floor was wet, just having

been mopped. Fell backwards and struck back of head. Has abrasion and contusion of left index finger. Pain on motion of left shoulder and of lower cervical spine. Some recurrence of lumbosacral pain with present" -- can't read the next word.

Then, under diagnosis, it has five different items, one of which is sprain of the left shoulder.

Q Do you remember complaining of pain in your left shoulder, now that you've heard this document?

A I never complained. When I went up there, I asked for X-ray all over my body and they gave me X-ray from my toe up to my head. Never complained of any injury.

Q Did they X-ray those parts of your body that you were complaining about?

A I didn't complain nothing.

Q You didn't complain.

A But I just asked for some X-rays in case of any injury on me. If I was injured, I wouldn't be allowed to continue the course. If I am injured, I -- when I was in the school, I should have gone up for treatment or some medication. But for the almost seven months I was i n the school, the only time that I miss the school seven days a week is the days when they send me to Marine Hospital for X-rays.

Q For the X-rays. Did they tell you you were not fit for duty for a period of time?

A "Observe yourself," they told me. "Observe yourself and come back." So I wasn't feeling no injury, no nothing. THAt's why I went back to the school.

Q If you were disabled for any reason, they wouldn't let you continue with the school, is that right?

A If you are injured, they wouldn't let you in. But I'm physically in good condition, no pain, no nothing. For almost seven months I was in school, just two days I was out of school. THat's the time that I went up to the Marine Hospital and have X-rays. The record with my instructor --

Q Did they take an X-ray of your right shoulder?

A Every part of my body, from toe to head.

Q They took an X-ray of your right shoulder?

A Every part of my body, from toe to head. Right shoulder, left shoulder, toes, everything. I was found fit for duty.

MR. CARR: Your Honor, rather than offer all the X-rays, I think that I can shortcut it by simply offering the packet in which they arrived from the NMU Clinic, listing the various parts of the body that were X-rayed.

THE COURT: All right with me.

MR. LEVINE: I have no objection, your Honor.

THE COURT: Thank you, Mr. Levine.

(Defendant's Exhibit D was received in evidence.)

xxx

MR. CARR: This packet which contained the X-ray films from the NMU Clinic lists the following X-rays which were taken on September 9th of 1971:

Skull, left shoulder, cervical spine, dorsal spine and lumbosacral spine.

If the Court wishes, I will make the same offer I made this morning. A doctor has just arrived for Mr. Levine.

THE COURT: All right. Let's interrupt and get the doctor.

MR. LEVINE: May we have a two minute recess, your Honor?

THE COURT: Two minutes? All right.

We will take a short recess.

(Witness temporarily excused)

(Recess)

MR. LEVINE: I call Dr. Benjamin Golub.

- - -

2
D R. B E N J A M I N S. G O L U B,
3
called as a witness by the plaintiff, being first
4
duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEVINE:

Q Can you tell us the nature of your profession?
9
A I am a physician.
Q Do you limit your practice to any specialty?
10
A Yes, sir.
11
Q What specialty?
12
A Orthopedic surgery.
13
Q In connection with your specialty of orthopedic
14
surgery, are you connected with any hospitals?
15
A Yes, sir.
16
Q What hospitals?
17
A The Hospital for Joint Diseases.
18
Q In what capacity?
19
A As Attending Orthopedic Surgeon.
20
Q And, doctor, do you teach any orthopedic surgery?
21
A Yes, sir.
22
Q Can you tell me in what institution?
23
A I participate in the residency training program
24
and I'm also Assistant Clinical Professor in orthopedic
25
surgery, Mt. Sinai School of Medicine.

Q Now, doctor, do you have a diplomate's rating?

A Yes, sir. I am a diplomate of the American Board of Orthopedic Surgery.

Q Are you also a FACS?

A Fellow of the American College of Surgeons, Fellow of the American Academy of Orthopedic Surgeons, Fellow of the New York Academy of Medicine.

Q Doctor, did you at the request of the plaintiff's attorney's office examine Mr. Frank Balecha?

A Yes, sir.

Q Can you tell me when you first examined him?

A October 17, '72.

Q And at that time, doctor, what did your examination consist of?

A It consisted of the taking of a history and past history, examination of the cervical spine, upper extremities, taking of X-rays.

Q Doctor, can you tell us what were the findings that you made at the time of your physical examination?

A Well, do you want positive and negative?

Q Yes, sir.

A He was partially exposed. The cervical spine, or neck, presented no tenderness and no spasm or rigidity. There was painless restriction or limitation of extension,

which is backward bending of the head and neck. The other motions of the neck were carried out completely.

At the left shoulder there was no swelling. There was scapular muscle atrophy. That is thinning, or wasting, of the muscles at the scapula, which is the shoulder blade. There was tenderness over the insertion of the cuff at the greater tuberosity.

The shoulder is moved and stabilized by muscles which attach to it. The greater tuberosity is a bump at approximately this location (indicating), where certain of these muscles attach, and there was tenderness at that particular site.

There is a questionable slight sulcus at this site. You can understand that these muscles attach in a rather smooth contour. When there is a partial tearing in the area, one may be able to feel a dip in the smooth contour, and this was present to a slight and possibly questionable degree, but there was something there.

Then the motion of the shoulders. On the right-hand side motion was carried out completely, and that is 180 degrees, which is full overhead motion; abduction, which is the side excursion; forward flexion, which is the same excursion in the forward direction and again goes to 180 from zero. External rotation, which is the outward rotation,

should go approximately 40 or 50 degrees. And internal rotation, which is scratching your back, should go 30, 35 degrees. These were all complete on the right.

On the left side, abduction, or sideward movement, was limited to 80 degrees, which is approximately this point (indicating); forward flexion was limited to 110 degrees, which is approximately this level (indicating); external rotation was limited to 30 degrees, which would bring it to about here (indicating); and internal rotation was limited to 20 degrees, which would restrict it somewhat like so (indicating).

The acromio-clavicular joints -- those are the joints where the clavicle, or collar bone, joins the rest of the shoulder -- showed proliferative changes. These are changes of bony thickening secondary to old wear and tear changes. There was no tenderness of the acromio-clavicular joints.

Now, on actively abducting both arms -- that means with the patient holding both arms away from him like so (indicating) -- the examiner then presses down at about this point on both sides (indicating), and when that maneuver was carried out there was weakness on the left on downward pressure.

Then the rest of the arm. There was free

motion of the elbows, writs, fingers, complete physical bilaterally. Sensation, which means the perception of touch, was intact. There were bilateral flexion contractures. PIP joints of little fingers -- the PIP joints are the first joints after the hand itself -- showed little contractures, or limitation of full straightening, and I felt that these were congenital.

That was the physical examination.

Q Doctor, based upon your physical examination, did you come to a diagnosis?

A Yes, sir.

Q Tell us what the diagnosis was.

A I felt that the history and findings were those of a significant partial cuff tear at the left shoulder.

Q And what is a partial cuff tear?

A You can visualize the shoulder. The head of the humerus, which is roughly shaped like so (indicating), sits in a hole, or cavity, the glenoid, which is roughly like so (indicating). It is a rather shallow situation. It is retained in place by the capsule, which is the envelope of fibrous tissue that surrounds it, and particularly by the muscles which attach all about it.

Four of these muscles attach at one point, at the area of the greater tuberosity, which is a bony bump --

this is the head of the humerus and this is the shaft (indicating) -- at approximately this point (indicating), and under certain circumstances, under certain trauma, what-have-you, there may be a rent, or a tear, at the site of attachment of those muscles.

Those attachments are referred to as the shoulder cuff, and a tear at that site is referred to as a tear of the cuff, which may be either partial or complete. If it is complete, there is no motion possible in the arm at all. Partial may permit partial motion with considerable weakness.

Q Doctor, I want you to assume that Mr. Balecha -- by the way, you were told his age, were you not?

A I have his age as sixty in 1972.

Q Mr. Balecha worked as a seaman. Are you familiar with the work of a seaman in general?

A It means keeping your stomach settled, mostly. But it is heavy work, I believe.

Q All right. He worked as a seaman most of his adult life, and on March 27, 1972, while aboard a vessel, he slipped, striking his left shoulder against a bulkhead; that he received treatment aboard the vessel in the nature of Ben Gay; that he continued to work although having good days and bad days, the bad days referable to the pains in

his shoulder, until July of 1972, when he first reported to the United States Public Health Hospital; that he went under a series of treatments at the Public Health Hospital extending over a period to October of '72, and I believe your examination was --

A October 17th.

Q -- October 17th, just before the period of disability.

During that time he was also examined and treated by a Dr. Goldberg, who gave him heat treatments and massages on four occasions; that he had a series of treatments at the out-patient clinic, consisting again of various types of physical therapy; and your findings on October 17th.

Doctor, can you state, with a reasonable degree of medical certainty, whether or not the accident that I have described of March 27, 1972 would be a competent producing cause of the findings you found on October 17, 1972?

A I can so state.

Q And were they a competent producing cause?

A I believe they were.

Q Now, doctor, did you subsequently examine Mr. Balecha again?

A Yes, sir.

Q And when was that?

A On April 2, 1973.

Q That's about six months later.

A Yes, sir.

Q And what were your findings then, doctor? And would you just give us your positive findings now?

A All right. At the left shoulder there was scapular muscle atrophy; that is the wasting, again, of the muscles of the shoulder blade. There was tenderness over the insertion of the cuff at the greater tuberosity. That is at this site (indicating). Motions of the shoulders were the same, with the exception that on the left, forward flexion, which initially came to 110, this time went to 120. The other motions showed the same excursion.

Again, on holding both arms abducted and pressing down, there was weakness on the left. In the interim he had sustained injury to his left little finger, and this showed tenderness at the site of fracture, with restriction of motion and duskiness.

Q Doctor, when you talk of the atrophy, did you measure the atrophy?

A No, sir. This does not lend itself to measurement, as atrophy in an arm or a leg does. This is visual.

One compares one side with the other, and there was visible thinning, or wasting, of the muscles about the left scapula as compared with theright.

Q Doctor, assume that Mr. Balecha was right-handed. Would that account for the thinning?

A Theoretically that might make some difference. But in practice, in individuals, most of whom of course are right-handed, who have not had specific trauma involving the left upper extremity, with its attendant disuse, the muscle areas of the scapula are fairly symmetrical in appearance.

Q Now, doctor, did you re-X-ray Mr. Balecha?

A Yes, sir.

Q And did your X-rays to the left shoulder show anything of significance?

A No, sir. On both occasions there were minimal proliferative changes of the greater tuberosity -- that is, again, the little bony prominence to which many of these muscles attach -- and there was a little bony thickening, which is referred to as proliferative change, and this is rather old, long standing and related to the gradual wear and tear that takes place in these tissues, particularly in a heavy laboring individual.

Q Would those changes you found have any significant

effect on the motion of the shoulder?

A I don't think so, in and of themselves, because you can X-ray a hundred individuals off the street who will show this change and have no complaints and no findings.

Q Now, doctor, while aboard the vessel, shortly before your second examination Mr. Balecha states that he attempted to hold open a door which weighed approximately five hundred pounds by leaning his left shoulder against it, that when he made contact with thedoor with his left shoulder he felt an instant pain and a sudden numbness of his entire left arm.

Doctor, is there --

MR. CARR: Your Honor, I am going to object to that paraphrasing of Mr. Balecha's testimony as contrary to my recollection.

THE COURT: Well, it will be the jury's recollection. I don't recall it that specifically.

MR. CARR: If I may state my recollection, I believe Mr. Balecha said that he put his left shoulder against the bulkhead and not against the door.

THE COURT: Against the bulkhead; yes, I think so.

Q Doctor, assuming that he put it against the door --

MR. CARR: Well, I don't want the doctor to assume anything that is not in the testimony, sir.

THE COURT: Do you want to stop the trial while we check it? What possible difference does it make whether it was the door or wall or a bulkhead, will you tell me?

MR. CARR: I don't think the bulkhead is moving, sir, and I think the question is that it is a five hundred pound door that is moving against the man's shoulder.

THE COURT: All right. Perhaps you could find the plaintiff's testimony, Mr. Greenberg.

(Pause)

(Record read.)

THE COURT: All right. Go ahead. Your question is proper. Objection overruled.

BY MR. LEVINE:

Q Doctor, you have just heard the description of the accident that happened in March of 1973, and I am asking you, doctor, whether or not the injury that you found in October of 1972, or the findings that you found in October of 1972, could have caused this pain and numbness that has been described by the plaintiff as occurring in March of 1973, considering that this door in question wieghed approximately five hundred pounds.

A Well, I would certainly believe this leaning a shoulder with this pathology against a heavy door could certainly cause severe pain. I can't figure out the numbness part of it except to state that I don't really believe there was actual nerve compression. I would think that this is a matter of expression and interpretation, and in the presence of severe pain patients frequently will say "My arm went dead" or "My arm went numb," whereas in actual fact, if you were to examine teh patient neurologically at that precise moment, that would not really be the case.

I would state that this was an aggravation, a painful aggravation of his pathology at that time.

Q All right. Now, doctor, you examined him shortly thereafter.

A Yes, sir.

Q And can you tell me, doctor, based upon your two examinations, is there any change in your diagnosis?

A No, sir.

Q What is your prognosis, doctor?

A Well, on the basis of two examinations over a fair period of time, with the initial examination again after a fair period of tiem and with the residual findings, I would say the prognosis is guarded and the outlook is not particularly good for significant improvement from this

status.

Q Doctor, I show you Plaintiff's Exhibit 8 in evidence, particularly the report of September 26, 1973. Pointing to this portion of the report, doctor, to save some time, "Patient also does not want any manipulation or surgical release since it was explained that the procedure is not with guaranteed results.", can you tell us, doctor, what are they talking about, manipulation or surgical release?

A Well, they believe that this restriction of motion which is present is a reflection of a partially frozen shoulder, which is a pathological condition which may come about after a trauma, and rather simply it is just that the shoulder, being a very freely movable joint, has rather loose attachments, with many layers of delicate, filmy tissue which normally glide over each other smoothly to permit the varied motions of the shoulder.

Following a pathology and the various tissue responses to pathology these may become plastered together and a fibrotic reaction occurs in which they adhere to each other and grossly limit the multiplicity of motions that the normal shoulder is capable of.

One of the treatments for this situation -- and I might say that a simple frozen shoulder in most cases will

normally go through its own cycle over a period of one or two years and subside and the motion usually will return to a fairly complete extent. But one of the treatments for a frozen shoulder is socalled manipulation, in which the patient is anesthetized and the shoulder is passively taken by the surgeon and carried out forcibly through a range of motion, and this is accompanied by little popping sounds, which presumably are the tearing of these adhesions.

There may be a louder popping sound, which is the tearing of the long head of the biceps, which is the biceps muscle here (indicating). Many surgeons have had the unhappy experience of hearing a real loud popping sound, which is a fracture of theshoulder, and this makes you nervous.

The procedure is done to a limited extent under certain circumstances. I don't believe it would be the answer here. I would certainly not do it myself. In general, it is not a happy procedure. It is a pretty painful thing afterwards, and you must force the patient to maintain the achieved range of motion.

It used to be done rather commonly maybe thirty years ago. I can't say that it is done terribly commonly in these days, but it still is under certain circumstances.

He talked about a surgical release. I don't

know what that means at all in connection with this. I can't imagine what they would do.

Q Now, doctor, one other question. I'm sorry; I asked you your prognosis already, did I not?

A Yes.

MR. LEVINE: I have no further questions, doctor.

CROSS EXAMINATION

BY MR. CARR:

Q Does this sort of condition, doctor, as you say, work itself out --

A Which condition are you referring to?

Q The frozen shoulder.

A Ordinarily --

Q Let me finish the question. Does this condition of the frozen shoulder that you described work itself out over maybe a one or two year period with normal use?

A Yes. Yes, I would say so. We don't like patients to find out, but if you do something, if you treat it or if you don't treat it, they end up pretty much the same way.

Q Now, that record that Mr. Levine just referred you to, specifically September 26, 1973, which is just last week, I believe, would you read the record in its entirety up to that point?

A "Sixty one year old" --

Q American seaman.

A -- "American seaman with left frozen shoulder came in today for further" -- something-"up". It can't be coverup.

Q I can't make that out myself.

A Maybe it is "workup." I can't read the next word.

Q Been.

A "Been on active physical therapy program. Patient feels better with less" --

Q Discomfort.

A -- "discomfort," I guess, " and with increased motion." And then an examination.

Q Yes.

A "Abduction of the left shoulder to 130," which is better than I had found it at the time I saw him, and that would be at about here (indicating). "External rotation 70 degrees." I would say that should be to here (indicating). 70 would be about almost complete or a shade short.

Q Almost complete?

A Almost complete or maybe five or ten degrees s hort.

Q Okay.

A "Full flexion and extension" --

Q What does that mean, full flexion and extension?

A Flexion, I guess they mean this (indicating); and extension, I guess going backwards (indicating).

Q That was complete?

A And what is this?

Q I think it is internal rotation, but I'm not certain.

A It looks like z-something. I can't make that out. "Patient has been improving so much since last visit, will continue on conservative treatment. Patient also" --

Q Okay. You've read the rest of it.

A Okay.

Q That note, at any rate, indicates a significant improvement, in this particular examiner's opinion, does it not?

A It would appear so.

Q And on that occasion last week they declared him fit for duty, is that correct?

A I don't know.

Q The disposition at the bottom - do you see the three initials, F. F. D.?

A It looks like it might be that.

Q Now, is there a distinction between a frozen shoulder and a torn rotator cuff?

A Oh, yes.

Q What is the distinction?

A I think I went into that previously. I'll do it again.

A torn rotator cuff is a physical, actual tearing through the substance of the rotator cuff, which is a fibrous, dense fibrous area, which is the site of insertion of four shoulder cuff muscles at the greater tuberosity, which is just at this point (indicating).

Now, there is an actual physical rent, or tear, through that substance, deep into the substance of the deeper tissues. This may be partial or complete.

Now, a frozen shoulder may occur in an otherisewstructurally -- I should say in a structurally intact houlder as a result, for example, of a patient who has had a heart attack and lies perfectly still in bed for a number of weeks without moving his arm. Such a person may develop a frozen shoulder. It may follow various forms of trauma to the shoulder, but it may come in little old ladies for no apparent reason.

But these cases, and I've seen many of them and everybody has, go through a period of self resolution which may take a year and maybe even as long as two years, but they all go through this resolution and resolve, and motion returns. And you can treat them diligently and vigorously or you can not treat them and just look at them once in a while. The result seems to be the same.

Whereas a cuff tear is a completely different

situation and you are left with the defect, you see.

Q Now, before you testified, did Mr. Levine tell you that Dr. Goldberg had been here today and testified?

A I don't remember him saying that, or at all.

Q This proliferative change that you noted on the X-ray in the left shoulder, was that connected to trauma?

A No, sir.

Q That is just g radual wear and tear that we all go through?

A That's right.

Q You say that could produce symptoms or it could not produce symptoms?

A In and of itself I would doubt it, I would doubt it. I think, as I said before, if we X-rayed the general population, we would find that with each passing decade there is a greater amount of these changes.

Q Did you X-ray the right shoulder to see if those proliferative changes were present in that member?

A No, sir. I felt there was no reason to X-ray the other shoulder.

Q If the right shoulder were negative, if the X-ray of the right shoulder were negative and the X-ray of the left shoulder were as you have seen it, might that cause you to reflect on your opinion as to --

A No, sir, not at all. It has nothing to do with it at all.

Q When you say proliferative changes, as I think you did, does that encompass arthritic changes?

A Well, arthritis is degenerative change in a joint. Part of the degenerative change is a destruction of cartilage, a roughening and irregularity of contour of the articular surfaces of the joint, sclerosis, or increased bone density deep to the area of destroyed cartilage or partially destroyed cartilage and bony osteophytes, or proliferative thickenings about the joint. That is the X-ray picture of an arthritis.

Q Did you notice any tenderness at the greater tuberosity?

A On the left shoulder?

Q Yes, sir.

A Yes. I referred to them in each examination.

Q Is the greater tuberosity the area where this man had the roughening on X-ray pictures?

A Yes, it is. It tells us the site of cuff tear.

Q You mentioned two kinds of cuff tears, a partial tear or a complete.

A That's right.

Q What clinical findings must you have to be

diagnostic of a partial tear?

A Well, the clinical picture is roughly the same, except --

Q The same as what?

A The both instances, except with a partial tear there remains some power of abduction. With a complete tear you can hardly move it except a couple of degrees.

Q Would you agree with Dr. Goldberg that the only way to confirm a partial tear of the rotator cuff is by surgery?

A No. I just made the diagnosis.

Q You say a partially frozen shoulder may fcllow trauma, trauma meaning an insult to the shoulder of some kind?

A That's true.

Q And then again it may not.

A That's true too.

Q What kind of an injury normally produces, what kind of trauma normally produces a cuff tear?

A It may be a lifting type of injury. It may be a direct blow, under certain circumstances.

Q Under what circumstances?

A Well, you must remember that at each passing decade there are degenerative changes which take place

involving the shoulder, its contents and the cuff area, and if an individual had a direct trauma to the shoulder, well, very simply, in a downward direction, for example, putting a longitudinal, what we call an axillary, stress, in other words just pulling the muscle down could be enough to produce this tear.

Q How about bumping your shoulder against the wall?

A If you bumpted it hard enough, this is perfectly possible, yes.

Q Probable?

A Probable. It is seen with reasonable frequency.

Q But what is the most frequent type of mechanism that produces a cuff tear?

A Classically it occurs more commonly in heavy laboring people who are lifting something.

Q Lifting?

A That's right.

Q How about falling on the outstretched hand, with the hand behind it?

A Falling with your hand behind you.

Q In this position (indicating).

A Any set of circumstances that produced longitudinal stress at that site could conceivably produce this.

Q In your case you would not recommend surgery for

Mr. Balecha.

A No, I don't think so. I think that the only salvation, if there is a salvation, is active exercise and physical therapy.

MR. CARR: Thank you.

REDIRECT EXAMINATION

BY MR. LEVINE:

Q Doktor, two questions. Did your X-rays on either occasion show any evidence of arthritis?

A No, sir, they did not.

Q And the other question, doctor. With respect to the future of Mr. Balecha, is the type of injury that he has sustained one that will, with a reasonable degree of medical certainty, produce pain and suffering in the future?

A Under certain stress activities, yes. I mean, if he walks along with his arm at his side, it probably w ont' bother him too much. But carrying out certain activities, and in particular overhead activities, there will be definite symptoms.

MR. LEVINE: All right.

THE COURT: Next witness.

MR. LEVINE: Your Honor, I will defer to Dr. Lodico.

THE COURT: What have we got here, a medical course? I think it is cumulative.

MR. LEVINE: This is the defendant's witness.

THE COURT: The defendant's witness?

MR. LEVINE: Yes, sir. I will allow it, if Mr. Carr desires it.

THE COURT: All right.

MR. CARR: Dr. Lodico, would you take the stand.

THE COURT: Briefly. This gets burdensome.

- - -

D R. V I N C E N T L O D I C O,

called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARR:

Q Would you briefly give us your medical background, please, doctor?

THE COURT: Perhaps Mr. Levine will concede it.

MR. LEVINE: I will concede that Dr. Lodico is a physician and that he does orthopedic work.

THE COURT: And that he is qualified?

MR. LEVINE: Yes, sir.

THE COURT: All right.

Q Dr. Lodico, at my request did you examine Mr. Balecha, the plaintiff in this case?

A Yes.

Q What date did that examination take place?

A December 13, 1972.

Q Before your examination of Mr. Balecha, did you obtain a history from him?

A Well, not completely from him. He supplemented it, but basically it came from Mr. Joseph Friedberg, his attorney.

Q All right. What was that history?

A On March 27, 1972, while employed as a Pantry Utilityman aboard the SS Carbide Texas City, Mr. Balecha was carrying a pail of garbage through the messhall intending to exit to the open deck and dump the garbage aft. As he passed a point in front of the refrigerator he was caused to slip, lose his balance, and to strike his left shoulder against a bulkhead.

Do you want me to continue beyond that?

Q No. That is sufficient. Did you question Mr. Balecha as to whether or not he had ever sustained previous injuries to this shoulder?

A Yes.

Q And what was his response?

A He told me that he never hurt his left shoulder before the present accident but that he had hurt the lower back six to seven years previously.

Q What were his complaints when you saw him?

A Pain with restriction on motion and crackling sensation in the left shoulder.

Q What did your examination itself consist of?

A The examination itself consisted of the overall survey of the patient. He did not appear to be in any pain. He was healthy looking, walked in a normal fashion, and did not present any evidence of physical stress such as weight loss or wasting, and he was completely oriented mentally as to time, place and person.

The specifics of the examination, of course, included the examination of both shoulders, including the adjacent spine, neck and back, and I did not see any evidence of any scar formation about the left shoulder.

I noted that the muscles of the left shoulder had good tone and volume, which means that the size of the muscles on the left shoulder were equal to those on the right side, and the good tone means that the muscle is not flabby from loss of use.

I also asked --

Q Does that have any significance with respect to a finding of atrophy in the musculature?

A Good tone and volume is just the opposite, because when you get atrophy the volume, the size of the muscle, will diminish and the tone refers to the tightness that a muscle could be made, like when you flex your biceps.

So, with the preservation of the size of the muscle and maintenance of its tone it just means that the muscles have normal use, which also means that the joints that are governed by these muscles also function more or less in a fairly normal fashion. It doesn't have to be completely normal, but for practical purposes almost so.

Q All right.

A I also asked him whether he is right handed, because sometimes in a right handed individual there is a little difference in size, the right being slightly larger than the left.

I took measurements with a steel tape across the biceps and also across the proximal portion of the forearms, and on the right side his biceps had 11 1/2 inches circumference. On the left I also noted 11 1/2 inches. Then, on the proximal portion of the forearm, just below the elbow, which is the greatest concentration of muscles, I had 10 1/2 inches on the right and 10 1/2 inches on the

left.

I noted during the examination that he had a mild degree of a crackling sound in both shoulders, and I interpreted this as being some clinical evidence of arthritis, which is the process of wear and tear that comes with getting old and which has already been explained.

Q You found this in the right shoulder as well as the left?

A Yes. Bilateral means that he had it in both shoulders.

I also noted that when I attempted to get the patient to raise his arm, this is 180 degrees from the resting position on the side (indicating), the other went up so that there was a mild limitation of motion, which I interpreted as being approximately 15 degrees.

I also noted that on rotating the arm externally, which is this motion (indicating), and doing both, I noted that the right had approximately a 20 degree range of motion more than the left; and on internal rotation, which is this motion (indicating), I noted that there was a slight loss on the left side which I interpreted as being ten degrees.

Q Would these restrictions that you have just described limit a man in his activities as a pantryman?

A Well, the limitation is not of such a degree that it would keep a patient from doing that type of work. It is merely indicative that there is something that occurred in the past to his shoulder and he still had some residual loss of motion.

However, as I indicated, the good musculature that he presented shows that he had a high degree of normal use and for that reason I felt he could work.

I also noted that his grasping power was not impaired.

Q Did you examine this man with respect to his rotator cuffs?

A I was just looking that up.

The rotator cuffs, which have been already described as being in this general area of the shoulder (indicating), were preserved on both sides. I did not see any dimpling or depression where the muscles go to the shoulder joint, which would indicate that there may have been a partial tear and then it healed up with scar tissue. That was not the case.

And the elevation of the arms from the side, from resting on the side and going sideways, was performed without any difficulty. There was no lag on the left side, indicating that the rotator cuff was not involved there

whatsoever.

It doesn't rule out any initial straining to the musculature about the shoulder, but a strain, of course, is something that clears up. A tear would leave some objective evidence which could be demonstrated, and that, of course, I was not able to find even though I looked for it quite carefully.

Q Were there any particular trigger points of pain when you palpated the shoulder or touched the shoulder?

A I did not see any trigger points of pain, and the reason I looked for a trigger point of pain, it is the doctor pressing on a particular area where the claim of injury is. If there is a tear of a muscle at a particular point, when the doctor presses with his finger over the area, of course that will produce pain, and I was not able to get any trigger points of pain throughout the entire shoulder. He just had this generalized complaint of pain about the shoulder without any specific localization either to a muscle or to a ligament or to a joint.

Q Did that consist of your physical examination?

A In essence that is all I was able to see. I also indicated that I didn't see any evidence of synovitis. Synovitis is an inflammation of the lining of a joint, and that can occur with inflammation, it can also occur

with injury, it can occur from socalled rheumatism that affects joints.

Q All right. Did you have Mr. Balecha X-rayed?

A Yes. I sent him over to Dr. Milton Robbins of 36 East 36th Street, New York City, and after these films were taken we reviewed them jointly for the purpose of finding any defect about the shoulders.

I X-rayed, incidentally, both shoulders to make a comparison with both sides.

Q And what X-ray findings did you arrive at?

MR. LEVINE: If your Honor please, the doctor has testified that he did nto take these, they were not taken under his supervision.

THE COURT: He says he looked at them.

THE WITNESS: Yes. Dr. Robbins and I --

THE COURT: Tell us what you see.

What difference does it make whether he took them any more than somebody taking a picture of me?

Q Can you hold up the X-ray for us?

A I don't thing you are going to see anything except the film.

Q What particular shoulder wre we looking at?

A Well, this is the right shoulder. These two are right, and these two X-rays are of the left shoulder.

MR. CARR: Your Honor, do we have a shadow box?

THE WITNESS: There is one right here.

(Pause)

A (Continuing) This is the left shoulder. THis is the arm bone, which we call the humerus, and there is the head (indicating). This is the shallow depression that is known as the glenoid fossa, and this bone up here si also part of the scapula and it overlies the head of the humerus, and to this area you have attachment of muscles for the purpose of holding up the entire arm, and these muscles go to the neck, and this area is supprted by the neck musculature, so that the entire shoulder, which is only suspended by muscles and ligaments and not attached to any bone, will stay in its proper place, and that depends on the integrity of the muscles.

Now, at the point of the greater tuberosity, which is exactly this point that I am indicating with my pen (indicating), is a little calcific deposit, and this calcific deposit is the deposition of calcium by the patient over a period of years. It may have been two, three years, maybe even more. You also see some roughening of the bone at the junction of the clavicle, which is the collar bone, to the scapula, and this of course is

indicative of incipient osteoarthritic changes.

All of these changes here are due to the wear and tear of life and is part of the picture that we know as degenerative osteoarthritis.

The interval between the acromion and the shoulder joint is maintained. When you tear the rotator uff, this interval will widen because there is a slight drop of the arm, depending how much of the muscle is torn, so that the holding power between this point and that point is deminished. So that with the weight of the arm remaining more or less static, if you break away some of the holding attachments, of course there would be a corresponding drop.

There is no increase in the interval at this point when comparison is made to the right shoulder. Here is a picture of the right shoulder, and it was taken for exactly that reason. In essence these pictures could be superimposed one on top of the other. They are identical.

Talking about the right shoulder, you also see some very beginning degenerative changes at the clavicular-acromion joint and a very slight fuzziness in this area here, indicating some degenerative changes are also developing in the right shoulder (indicating).

The right shoulder degenerative changes are

best demonstrated in this view here, where a little scalloping, or a little roughening, of the smooth surface is noted, very much like on the other except that on the left it is slightly more.

So in essence these are normal shoulders. They have some mild osteoarthritic changes which are consistent with the aging process. There is no evidence of fracture and there is no dislocation of the shoulder, indicating that the ligaments and muscles that hold these bones together have not been compromised to the point that a doctor could recognize them on clinical examination.

Q Did you arrive at a conclusion with respect to this examination?

A Yes, I did.

Q What was your conclusion?

A Well, my conclusions were based upon my physical findings, the X-rays and also my knowledge as to what preceded me in the way of treatment by reviewing the hospital records.

The initial diagnosis was a contusion, which is a bang, that the patient got initially. Then I felt that he had recovered from this temporary condition, that the problems that this patient exhibited were basically those of early osteoarthritis.

Q What did the medical staff at the Marine Hospital say with respect to that contusion when they first saw him? Were these records made available to you for your review?

A YEs. I have quoted even that portion of the record. The initial impression was that the patient sustained a contusion initially.

Q What date is that?

A That is July 10, 1972.

Q I am showing you Plaintiff Exhibit 2 in evidence (handing). This is the first time that this man went to see a doctor after he got off the Carbide Texas City.

A I beg your pardon?

Q This is thefirst time that Mr. Balecha went to see a doctor after leaving the Carbide Texas City.

A Yes.

Q Could you read for us the initial description of that visit?

A "July 10, 1972, general clinic. Patient allegedly injured left shoulder when he fell while aboard ship. This accident was supposed to have occurred on March 28, 1972. Since that time he has continued to work without much difficulty."

Q You said without much difficulty?

A Yes. The zero with the hyphen on top means without.

"About two weeks ago left shoulder really became stiff and painful."

Then he was examined and they noted that abduction of the left shoulder produced some discomfort over the deltoid muscle, which is this area of the arm that I am touching (indicating). They took an X-ray of the shoulder and no fracture was discovered.

Q How was that X-ray read, according to their report?

A This X-ray report dated July 10, 1972. "The visualized bones are intact. There is no soft tissue calcification to suggest calcific bursitis or tendonitis. However, there is some calcification at the attachment of the tendon to the greater tuberosity. I am not sure of the clinical significance of this finding."

That was the radiologist.

Q Is that the same finding that you noted when you took the X-rays?

A Yes. I just described that.

Q All right. What was the examiner's impression on this first time?

A The impression was: "Contusion," then hyphen,

"no problems from that" and then question mark "early arthritis." And then the plan was to apply heat, rest, spinin compound, and he was made not fit for duty, to return to the clinic in one week.

Q All right. You were going to tell us what your conclusion was after reviewing these records, the X-rays you took.

A Well, in essence this is a picture that is characteristic of osteoarthritis. I was very deeply impressed by the complaint made by the patient that two weeks prior to July 10 of 1972 the shoulder really became stiff and painful.

Well, at that point a doctor has only two options open. Number one would be was there a new accident at that particular time to do that or does he have a flareup of osteoarthritis which causes this pain? Either one of them is possible.

On the basis of any negative history as to an accident at this particular time, then of course I would have to ascribe this thing to a classical flareup of osteoarthritis, which comes and goes in many individuals.

Q Tell me what the symptoms are of a man who sustains a tear of the rotator cuff.

A Well, a tear of the rotator cuff involves tearing

very strong ligamentous attachments to a shoulder, and sometimes the tear is so great they may rip off a piece of the bone to which it is attached. So that from a clinical standpoint, if a tear, partial or complete, of the rotator cuff takes place, it is a patient in a good deal of pain, unable to work, one that seeks immediate medical attention.

Q And how long was it before Mr. Balecha sought medical attention?

A Well, according to these hospital records, the first time he saw anyone was on July 10 of 1972.

Q Would you say that is consistent with a tear of the rotator cuff?

A No, that is not consistent with a tear of the rotator cuff but would be consistent with a contusion, as the patient stated he banged his shoulder somewhere.

Q Is that in essence the findings and conclusions you made?

A Yes. I agree with the U. S. Public Health Service doctors that if the history is true he did get a contusion to the shoulder like he indicated in the accident that occurred, but that he recovered from this and the picture that the patient has now is really one of early osteoarthritis manifested in both shoulders but somewhat

greater on the left, as I noted with some grating sounds when I passively moved the shoulders on rotation in particular, and that the finding of calcification there and the fact that two weeks before he went to the hospital he had a sudden flareup of pain, to me that is c classic d syndrome and picture of arthritis in its usual course of progression.

MR. CARR: Thank you, doctor.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. LEVINE:

Q Now, Dr. Lodico, you are not a radiologist, are you?

A Not a radiologist per se. I only indulge in radiology that part that has to deal with injury to bones and joints. That is part of the specialty of traumatic surgery and also orthopedic surgery.

Q As a matter of fact, you sent Mr. Balecha to a radiologist, didn't you?

A He has the X-r ay machine and I don't have any, by choice.

Q Doctor, let's get along. Did you send him?

A Yes.

Q That's all. If you want to give a reason, your lawyer will take care of it. Let;s make it short.

And the radiologist took the plates and read them, did he not?

A Yes.

Q And did he give you a report?

A He did.

Q And I believe you said you reviewed the X-rays with him. Was that before or after his report?

A I believe it was before.

Q I see. And having reviewed it with him, he then prepared a report.

A Well, then he prepared his own report.

Q He prepared a report directed to you, did he not?

A Yes.

Q He sent it to you.

A Right.

Q And you sent it to your attorney, to Union Carbide's attorneys, did you not?

A No. Dr. Robbins did that himself.

Q Oh, Dr. Robbins did that himself.

Now, you got a copy of that report.

A Yes.

Q When you reviewed it with Dr. Robbins, did you point out to Dr. Robbins that there was osteoarthritis of the right shoulder?

A Well. his description is quite evident. It speaks for itself. The osteoarthritis is a clinical diagnosis which is partly based upon the X-ray findings that I enumerated and Dr. Robbins enumerated.

Q Dr. Lodico, I don't want to mislead you. I said the right shoulder. Do you want to change your answer?

A Maybe I wasn't paying attention.

Q I have no desire to mislead you, doctor. I'm sorry. I'll repeat it.

Did you discuss with Dr. Robbins the osteoarthritis tahat you found of the right shoulder?

A No. Those were my own clinical observations made plus the slight roughening which I described in this court also being present on the right shoulder.

Q Doctor, all I asked is for a yes or no answer. Did you discuss it or didn't you?

A No, I did not. As far as I recollect, I did not.

Q Did you discuss anything about the right shoulder with Dr. Robbins?

A Well, both shoulders were discussed. I presume that both were completely evaluated so that I could proceed from there.

Q By both of you they were completely evaluated?

A Yes, my own and also his own evaluation.

MR. LEVINE: If your Honor please, Dr. Robbins is not here. However, pursuant to the practice in this court a copy of his report has been given to me, and I would like the privilege of cross examining the doctor with respect to that report since he has testified that he discussed it with the doctor before it was prepared, and this is the physician he has sent him to.

THE COURT: All right.

Q Doctor, you have a copy of Dr. Robbins' report?

A Yes.

Q Could you read, doctor, what he says about the right shoulder?

A "Right shoulder. The bones and joints and soft tissues are normal."

Q And with respect to the left shoulder, I am reading, and tell me if I am correct, "The osseous structure" -- that is bones, is it not?

A Yes.

Q --"is excellent throughout the left shoulder. There is most minimal irregularity at the greater tuberosity itself. I see no calcification in the soft tissues or any other pathology."

Is that what he says about the left shoulder?

A So far, that's what he said.

Q All right. That's his reading. We haven't gotten up to his impressions yet.

Now, does the doctor -- I'll withdraw that. The doctor makes an impression, which is a diagnosis, does he not?

A Yes.

Q What does he say in his impression?

A "Minimal osteoarthritis of the left shoulder."

Q Minimal.

A Yes.

Q Does he say any osteoarthritis of the right shoulder?

A No.

Q Does he say any calcification of the right shoulder?

A No.

Q Does he say any calcification of any of the points that you pointed out on the scapula of the left shoulder?

A You mean the acromio-clavicular joint?

Q No. I believe you used the word "scapula": "I see some irregularities on the scapula."

A No. I referred to the acromio-clavicular joint.

No, he doesn't mention that either.

Q All right, doctor. You agreed, I believe, or you testified you agreed, with the report of the United States Public Health Service. This was based upon a single examination, was it not?

A You mean my examination?

Q No, no. This report that you read, that you agreed with, contusion of the left shoulder.

A Well, that's one of the various examinations that they did. I happen to agree with taht.

Q That was the first examination, was it not?

A Yes.

Q And was that examination done in the general clinic or the orthopedic clinic?

A The general clinic.

Q And, doctor, is it not a fact that an injury or a treatment of an injury to a shoulder is an orthopedic problem as opposed to a general clinic problem?

A No, that's not necessarily true. It belongs to orthopedics, but it belongs to traumatic surgery and general surgery also takes care of that.

Q A general clinic is general surgery?

A No, it is not. I didn't say that.

Q Does this problem belong in general clinic?

A That is the schooling clinic, and they have doctors who are experts there in the screening out of cases, and they send them to the various clinics after they have made an initial evaluation as to where it belongs. So these doctors have to be expert in recognizing disease.

Q All right. Now, doctor, having been examined under general clinic on July 10th, did he then go back on July 18th to the same kind of clinic (handing document)?

A That's another clinic.

Q That is another clinic.

A Yes. I think it says "Sc," which may mean screening, I am not sure, "emergency" after that.

Q I see. So he went back on July 18th to another clinic.

A Right.

Q Doctor, I read you the report from this clinic, July 18th:

"Patient continues to have pain and discomfort and he claims not to be able to adduct the left shoulder greater than 60 per cent."

MR. CARR: Sixty degrees.

MR. LEVINE: Sixty degrees. I am sorry. I will leave this with him if I can read over your shoulder.

Q Did they then recommend a further examination of Mr. Balecha? I'm talking about the Public Health Hospital?

A Yes.

Q And where was that to be held?

A In the orthopedic clinic.

Q I see. Now, the orthopedic clinic sees him on August 7th.

A That's right.

Q Can you show me, doctor, anyplace where it says, talking now about their findings, contusion of the shoulder?

A They do not mention a contusion of the shoulder.

Q Do they mention osteoarthritis?

(Pause)

A I don't see that.

Q As a matter of fact, waht do they mention there, doctor?

A They mention two things, number one the history, and in the history they have the following: "Frozen left shoulder allegedly falling, direct injury to left shoulder in March of '72. Off duty four weeks."

Then "Physical examination: Slight atrophy of the supra and infra spinatus of left shoulder and moderate atrophy of the deltoid."

Q Let't stop there for a minute, doctor. Would

you with a contusion find atrophy of the supra spinatus?

A Am I to exclude the other diagnoses that I have mentioned?

Q No. Take one diagnosis at a time. Contusion of the shoulder. Would you find atrophy of the supra spinatus?

A If it a severe contusion, yes. The patient would have so much pain, he would not use the shoulder, and in not using the shoulder he would develop atrophy.

Q And atrophy of the deltoid?

A Yes. That's part of the shoulder musculature.

Q As a matter of fact, they don't say slight atrophy of the deltoid, do they? They say moderate atrophy.

A No. They have "slight atrophy of supra and infra spinatus of left shoulder and moderate atrophy of the deltoid."

Q Thank you. Doctor, they don't say "slight atrophy of the deltoid" --

THE COURT: Let's not argue. Next question.

Q All right. Doctor, did they do an abduction test on him?

A They did an abduction test and they were able to get the arm to 90 degrees.

Q What is normal?

A With the arm from the resting position, abduction

of 90 is practically normal.

Q Doctor, are you telling me that abduction is 90 degrees, that is as high as abduction goes?

A It is practically within normal limits. It varies in different individuals.

Q Let's understand something. What is abduction, doctor?

A Abduction is taking the arm, if I may stand, from the side and raising it up this way (indicating). You can't go very much higher than that. If you rotate -- just a minute. If you rotate the arms upwards, then you can proceed up this way (indicating). But you have already added another motion.

But in no way can you get my arms beyond this point. I just cannot do it, and I haven't got any shoulder injury. This is the limit of true abduction. With the arms and the palms facing the body, that's all you can go. Some people that are thin can go up a little higher.

If I turn my arms upwards, the palms upwards, then I can go right up.

So you are combining two motions when you describe that.

Q Doctor, let me ask you something. Are you familiar with the ranges of motion as put down in physical therapy

sheets?

A I read them and I completely discard them because I don't understand them, and to each doctor it means something else, and therefore I don't use that any more. I merely use one arm and compare it to the other, which is the true range of motion and the true range of restriction.

Q Then where they talk in a physical therapy sheet, and I'm talking now of the United States Public Health Physical Therapy sheets, where they talk of flexion and they say zero to 125, do they mean zero to the maxim that should be?

A I don't think I understand your question.

Q Well, I'm trying to understand. When they put down figures --

THE COURT: The object is to make the jury understand. That's the object.

MR. LEVINE: All right.

THE COURT: Not to have a medical dialogue.

Q When they put figures down on a physical therapy sheet and they say, for instance, extension of the arm zero dash 45, does that mean that extension runs between zero degrees and 45 is what would be normal extension?

A I really can't answer that for the simple reason

that I explained to you. You see, people use the term abduction from zero to 180, and I just explained to you that it is not possible to get 180 degrees on true abduction unless you add the external rotation and then you get it up.

THE COURT: We will recess now until 9.30 tomorrow morning. Don't talk about the case nor allow anybody to talk about it with you. 9.30 right here.

(The jury left the courtroom.)

(An adjournment was taken to Tuesday, October 2, 1973 at 9.30 a.m.)

- - -

JG TRANSCRIPT OF PROCEEDINGS BEFORE MACMAHON, D.J. 136
ON OCTOBER 2, 1973

FRANK D. BALECHA

vs.

UNION CARBIDE CORP.

New York, N. Y.
October 2, 1973
9.45 A.M.

(Trial resumed, jury present.)

D R. V I N C E N T L O D I C O, resumed.

CROSS EXAMINATION CONTINUED

BY MR. LEVINE:

Q Dr. Lodico, when we left off yesterday we were talking aboutthe range of motion in abduction, do you recall?

A Yes.

Q Doctor, I believe it is your testimony that the range of motion only goes up to the right angle with the body up to here (indicating).

A Well, that's a little higher than 90 degrees. That is about 110 or 115 degrees.

Q And that is the normal range of motion?

A That's just about the normal range. A normal person can raise the shoulders with the palms pointing downward.

Q Let me ask you this: Are you familiar with the

American Medical Assocaition?

A The AMA?

Q Yes, sir, the AMA.

A Well, we have an organization. I'm a member of that.

Q And you are undoubtedly familiar, doctor, with the practice of the AMA to form committees to standardize medical procedures throughout the country?

A Well, they form committees to evaluate problems and try and establish some guidlines. They are not rules that are mandatory for a doctor to follow, nor are they rules that are accepted widely by the medical profession. It is just a recommendation by a special committee. Some are good and some are not so good.

Q Well, are you familiar, doctor, with the guidelines set up by the American Medical Association for the evaluation of permanent impairment of extremities and the back prepared by the Committee on Medical Ratings of Physical Impairment?

A I am not so sure that I am aware of that. I think I am. But are you referring to the percentages of disability? Is that the thing that you are referring to?

Q Well, among other things they have that in there. There is a little more to it than just the percentages of disability. But you are familiar with --

A I am familiar with the one that came out with percentages of disability based upon ranges of motion and things of that type, and it was so confusing that it was just discarded. I don't use it. I don't know of any docotr in my immediate area that uses it. We use the patient himself.

If we want to evaluate the motion of a shoulder, we use the normal one and see what the normal one does and then see what the abnormal one does, and by subtracting the loss of motion of one shoulder from the other, we know exactly what the patient lost himself without referring to any statistical analysis.

Q Thank you, doctor. Then I assume you consider the report of this Committee and the evaluation schedules set up by them as not being something that you accept.

A I read it with interest and it represents an effort by the medical profession to establish standards, but they are only guidelines to a doctor examining the patient. I still say that each patient has to be examined by himself and the most perfect way of determining loss of motion is to determine what the normal arm does as against the abnormal one. I don't know of any better way than that.

Q Doctor, I will repeat. Is this a publication and are the statistics set in here as to ranges of motion some-

thing that you accept or don't accept? All it requires is a yes or no.

A Well, I just told you I'm not so sure what you are trying to show me there. Therefore I really cannot answer that question.

Q Then let me ask you, doctor, do you agree with the Committee on Medical Ratings of the American Medical Association when they state, and I quote on page 39 of their publication --

MR. CARR: May we have the date of that?

MR. LEVINE: Yes, sir. February 15, 1959.

Q "Restrict motion tables. AVerage range of abduction - adduction equals 180 degrees."

Do you agree or disagree with that statement? We are talking about the shoulder joint.

A I disagree with that because they are not describing a pure motion of adduction or abduction. I clearly demonstrated to you yesterday that with the arm down it is a pure motion of abduction. And you cannot go beyond a certain point. When you have to turn your palm up to get the hand over, you have already added to the external rotation, and therefore that is not a recommendation that I could accept. It is not based upon fact.

Q Doctor, are you familiar with theworks of Sir

Reginald Watson Jones, Extra-orthopedic Surgeon to Her Majesty the Queen, orthopedic surgeon to the the late Majesty King George VI, Director of the Orthopedic and Accident Service of London Hospital, Senior Surgeon of the Robert Jones and Agnes Hunt Orthopedic Hospital in Shropshire, Civilian Consultant in orthopedic surgery to the Royal Air Force and the British Editor of the Journal of Bone and Joint Surgery? Are you familiar with his works?

A I know that there is a Watson Jones and there are some procedures mentioned after Watson Jones. But I have not read that book and I'm not acquainted with all the titles that he has in Britain, not being acquainted with the medical ratings that they have in the British Empire.

Q Well, doctor --

A I presume he sounds like a very imposing, prominent man, but I don't know anything about him.

Q You don't know whether he is a competent or --

A I presume that he is a doctor, but I have not read his works and I have no opinions as to whether I would or would not agree with some of the conclusions that he has. Furthermore, his book has a lot of contributors. It is not his own pure book. So that any conclusions he has in that book are also based upon findings made by other doctors.

Q Well, let me ask you, doctor, do you agree with this

statement, discussiong rotator cuff injuries, page 451, the paragraph entitled "Injuries of the Rotator Cuff of the Shoul-er, Ruptures of the Supra Spinatus."

"In former years insult was often added to injury when patients sustained ruptures of the rotator cuff of the shoulder. They were nearly all charged with malingering. This is perhaps not surprising because the injury was often trivial and somewhat remarkable physical signs were not understood. Being asked to raise his arm, the patient would puff and struggle and go red in the face and still fail to elevate the limb beyond the right angle."

Is that the 90 degree angle you are talking about, doctor?

A That statement mentions so many things which are medical and non-medical in origin that I really don't know how to answer that question.

If you ask me a pure medical question, I would be very happy to answer it. We haven't discussed malingering as far as I am concerned in this case.

Q That was not my purpose, doctor. I was reading a preliminary statement there. The statement I am asking you --

THE COURT: Don't you think we've had about enough from this one doctor?

MR. LEVINE: Fine.

Q Doctor, just two more questions. Approximately what portion of yourpractice is devoted to doing examinations and testifying for defendants?

A Testimony, of course, is a very small part. As far as consultations are concerned, I would say that a substantial part of my practice deals with consultations, primarily defendant and also some plaintiff.

MR. LEVINE: Thank you, doctor. I have no further questions.

REDIRECT EXAMINATION

BY MR. CARR:

Q Doctor, I have just one or two questions. What, if anything, is the significance, doctor, of the injury to this man's left shoulder in September of 1971 as far as your evaluation is concerned?

A I'm sorry. In September of 1971?

Q Yes, sir. There has been evidence in this case that in September of 1971, while in the union hall, he had an accident and sustained an injury to his left shoulder. What is the significance, in taking a history from an individual, as to prior injuries or insults to the same member of the body?

A Well, getting a history of a prior shoulder injury

is very significant because it may explain findings which may be present at the shoulder at a later date and also may be responsible for some of the findings which are found at a later date and not related to another accident.

Q In July of 1972, when Mr. Balecha first appeared at the Marine Hospital, there is this statement in the record:

"About two weeks ago left shoulder really became stiff and painful."

Is that of any signfiicance to you?

A Well, as I indicated yesterday, I think that is very significant because it leaves two options to a doctor: one, the possibility that a new accident or some strain or something happened to that shoulder at that particular time which was dramatized by the patient by indicating it was two weeks ago; or, two, that there is osteoarthritis and you have a classical --

THE COURT: This is repetitive of what we had on direct, Mr. Carr. I don't propose to sit here all day forever with this one case.

MR. CARR: I don't believe I asked --

THE COURT: The doctor went into all of this very thoroughly on direct examination, and in any event that was the proper place to do it, not here, not on redirect.

MR. CARR: All right.

Q One more question. Is there any indication in your review of the medical records at the Marine Hospital that this man had sustained a tear of the rotator cuff?

A No.

MR. CARR: Thank you, doctor.

THE COURT: You are excused, doctor.

(Witness excused)

THE COURT: Next witness.

MR. LEVINE: Your Honor, Mr. Balecha was on cross examination.

THE COURT: Yes.

- - -

F R A N K D. B A L E C H A, resumed.

THE CLERK: You are reminded that you are still under oath.

CROSS EXAMINATION CONTINUED

BY MR. CARR:

Q Mr. Balecha, would you describe for us what your duties consist of as a pantryman aboard the SS Carbide Texas City?

A My duties, sir?

Q Yes.

A My duties on the Carbide Texas City is to take orders from the Chief Steward and the Captain. This is dumping garbages, bringing stores, check on the menu --

Q Dumping garbage. How many times do you dump garbage each day?

A When it is accumulated or half full. Taht is the order that I have from the Chief Steward, which I have always followed his orders.

Q Always followed his orders. So how many times a

day would you go about dumping garbage on a routine day?

A Sometiems in the middle of breakfast or before breakfast I got to dump it out from the evening; in the middle of breakfast time, when it is half full, I have to dump it out; and then after breakfast I have to dump it again.

Q So that is three times: before, during and after breakfast, in the early morning.

A In the early morning.

Q All right. When is the next time you routinely take the garbage out?

A In the morning, sir?

Q No; the next time after dumping it after breakfast.

A When it is accumulated. I have to sometimes not, sometimes yes.

Q When is the next time ordinarily that you do this?

A Eleven o'clock in the morning.

Q Eleven o'clock. So, by eleven o'clock you routinely take the garbage out four times?

A No. Not on Saturday. If I have no Saturday accumulated from the crew, that takes coffee time.

Q You take the garbage out after coffee time; and

coffee time is at ten o'clock each morning, is it not?

A I'm off that time.

Q But the coffe time the crew has is at ten o'clock?

A Yes.

Q And at coffee time the crew comes into themess room and takes a coffee break.

A A coffee break.

Q And then, when you come back on duty at eleven o'clock, you take the garbage out again.

A No. If it is not about half full, no.

Q If it is half full, you take the garbage out?

A I got to take it out.

Q Sometimes it is half full and sometimes it is not?

A Sometimes there is nothing in it.

Q Sometimes nothing is in there.

A Some days nothing is in it.

Q Okay. Then you also, after the lunch meal, take the garbage out again?

A Lunch meal, yes.

Q After the lunch meal. And at night do you take the garbage out again?

A After six o'clock, yes.

Q When you finish cleaning up in your pantry, you

take the garbage out?

A Yes.

Q That is one of your duties.

Now, carrying stores. How often do you carry stores every day?

A Before meal hour. As soon as I get in there, see that the pantry is all clean out, cups, everything like that, then go down below, the chilly box, pick up the stores.

Q Is that one deck below, the chill box?

A Yes.

Q And what kind of stores do you bring up?

A Milk, sometimes butter, fruits, stewed fruits.

Q Vegetables?

A No. I don't usually bring vegetables in the pantry except what I need lunch hour for appetizer.

Q Okay. And how many times do you go down to the chill box for stores every day?

A It all depends what I need. Sometimes there is not anything in the pantry or the salon. They ask me something. That is a part of my job.

Q It is part of your job?

A That is a part of my job, bring up the stores for both sides, the crew mess hall and the salon mess.

Q You bring up the stores for the other fellows too?

A Yes.

Q For the crew messmen?

A The crew messmen.

Q And the salon messmen?

A The salon mess.

Q As well as your own stores.

A I don't keep nothing except bread.

Q Is this a job you continued to do even after your rating changed to Steward Utility?

A That's what I was told, yes.

Q In January of 1973 you changed your rating, didn't you?

A I didn't change. They changed me.

Q All right; it was changed.

A It was changed.

Q Before January of '73 you were a pantryman.

A Yes.

Q Is that right?

A Yes.

Q After January of '73, this year, you've been working only as a Steward's Utility.

A Yes.

Q Were your duties the same as a Steward's Utility?

A The Steward put me in the pantry on the same job, he says.

Q The same job. Were your duties the same?

A The same.

Q In other words, you continue to dump the garbage every day?

A Whenever it is necessary.

Q Whenever it is necessary.

A Accumulated.

Q And you continue to bring the stores up every day?

A Every day.

Q And that's part of your normal duties as a Steward's Utility.

A Yes.

Q Have you been doing that in 1973 just like you did before?

A That's right.

Q I believe you said there were standing orders by the Chief Steward. You are talking about Mr. -- who?

A Britton.

Q Mr. Britton gave you standing orders never to go into the galley; is that your testimony?

A Yes.

Q I show you this packet of photographs which has been marked Plaintiff's Exhibit 1 in evidence. This particular photograph, can you describe what appears in that picture for us?

A This is inside the galley.

Q Where is the picture taken from?

A This could be taken by the door, pnatry door leading into the galley. This is the galley.

Q Well, if the pantry is like this (drawing), you have a door at one end that goes into the officers mess in here (indicating), and then a door here that goes into the galley and then another door here that goes into the crew mess; is that about right? And here is the galley and here is the pantry, here is the crew mess, and over here, on this side, is the officers mess, right (drawing)?

A Yes.

Q Is that the way it is set up on a ship?

A Exactly.

Q Exactly? Okay. And the pantry is where you work.

A Where I work.

Q And the route you said that the Chief Steward told you to take was the route that -- is there a door that

leads out to the open deck here (indicating)?

A Yes.

Q And do you see that door in this photograph (indicating)?

A Yes.

Q That is in the back of the photograph.

A Yes.

Q There is another door leading out to open deck here (indicating).

A Yes.

Q Is there a door on this side (indicating)?

A No.

Q Is there a door over here leading out to open deck (indicating)?

A Yes.

Q So, in order to get out to open deck to dump garbage from the pantry, you have three routes that you could possibly take.

A Yes.

Q One this way, one through the galley, and one out through the crew mess (indicating), is that right?

A Yes.

Q Now, the shortest route is this one here through the galley, is it not (indicating)?

A I was forbidden to go through that there.

Q The shortest route is right through the galley, isn't that right?

A Right.

MR. CARR: Your Honor, may I show the jury this photograph?

THE COURT: Sure.

Where was the refrigerator?

MR. CARR: I'll draw it on the sketch, sir.

Q Was the refrigerator right about here (indicating)?

A Something around there.

Q About like that (drawing)?

A Yes, in the bulkhead.

Q And the bulkhead comes out from the refrigerator about like that (drawing)?

A About a foot more out than the refrigerator.

Q Okay. Now, your accident, you say, occurred on March 27.

A Yes.

Q Two days before that, March 25th --

A Yes.

Q -- you say you saw the refrigerator leaking.

A I saw the crew messman mopping in front of it.

I didn't know, I didn't see it is leaking, but I saw the messman, Norwood, mopping, with a mop in his hand.

Q All right. Let's just talk about that date for a minute, March 25th. That morning you were doing the same job, carrying garbage out?

A Yes.

Q Okay. On March 25th did you step into the crew mess?

A Yes.

Q And when you stepped into the crew mess, you saw Mr. Norwood mopping.

A Mopping.

Q Where was he mopping?

A In front of the box.

Q In front of the icebox.

A The Frigidaire.

Q And when you saw Norwood mopping, what did you do that morning?

A I stopped there.

Q You stopped.

A He stopped me.

Q He stopped you.

A He stopped me.

Q Did you ask him if it was okay to go?

A He sayd, "You can't go through. I have to dry it up. The Frigidaire is leaking." But I didn't notice that it was leaking, but he told me it is leaking. That's how I know it was leaking.

Q All right. So what did you do when he stopped you?

A I went back inside. He told me, "I call you as soon as I get through mopping, drying up."

Q You went back inside the pantry.

A Inside the pantry.

Q Because he was mopping.

A Because he was mopping. He said the deck was wet.

Q Yes. You could see the deck was wet?

A No. The lights too bright and the deck was too clean.

Q The lights are too bright and the deck was too clean to see that.

A Too shiny.

Q So what did you do? Did you put your garbage down here (indicating)?

A Yes.

Q And you waited?

A Yes, until he called me out, three or four minutes

later.

Q That was the only time since you joined the Carbide Texas City in December of 1970 that you saw the refrigerator leaking, is that right?

A I didn't see the refrigerator leaking. I only know on what he told me, that the refrigerator is leaking --

Q Forget what he told you. This is the only time you saw water on that floor, is that right?

A I didn't see no water. But he was mopping.

Q All right; he was mopping. Is this the only time that you were stopped coming through the crew messroom by Mr. Norwood?

A Yes.

Q The only time?

A The only time.

Q Now, on March 26th, the next day, did you have any trouble going through the crew messroom?

A No trouble.

Q Dry as a bone?

A Dry.

Q March 26th.

A The 26th.

Q Yes. Okay. And you made about four trips through the crew messroom that day.

A Some times, yes.

Q Okay. About, I'm saying.

A About, yes.

Q At every meal you dumped garbage.

A When it is necessary.

Q And every time you walked past the refrigerator the deck was dry as a bone, right?

A Dry.

Q Okay. Now, on the morning of March 27th you reported for work at what time?

A Six-thirty in the morning.

Q Six-thirty in the morning. Did you take the garbage out at 6.30 in the morning?

A Yes, from the evening.

Q And did you go through the crew messroom?

A Yes.

Q And was it dry?

A Dry.

Q It was dry.

A It was dry.

Q Okay. And after breakfast, did youtake the garbage out again at 9.30 that morning?

A Yes.

Q And the crew messroom was dry?

A Dry.

Q No trouble going out through the crew mess?

A The crew messmen had mopped the whole messroom.

Q After breakfast?

A After breakfast. That is the spread hour. Hohn have his job to mop the messroom all around, and it was clean.

Q After breakfast.

A After breakfast.

Q Does Norwood have any duties in there if he spills something?

A On what?

Q Does he have any duties in the messroom if he spills something while he is working?

A At meal hour he serves.

Q All right. Before meal hour, when he is setting up to serve, suppose Mr. Norwood spills something on the deck; does he have any duties about cleaning that up?

A He clean it up, yes.

Q Is that part of his duties?

A That is part of his duties.

Q Did Norwood do a good job in that crew messroom?

A As far as I see. There is no complaint and the Captain comes around.

Q The Captain comes around and makes inspections.

A Inspection.

Q No complaints?

A No complaints.

Q Did you have any complaints about the way Norwood worked in there?

A I didn't have no complaint. He does his job as much as anybody does his job.

Q He kept that crew messroom like he keeps his own home, doesn't he?

A That's what I see, the way I see it. Everybody clean his own home as much as he could. I do my house. I don't know about other people.

Q In other words, Mr. Norwood took some pride in his job and did a good job in the crew messroom.

A That's right.

Q After your trip through the crew messroom at 6.30 in the morning, after your trip through the crew messroom at 9130 in the morning, you knocked off at around 9.45 or 10 o'clock; right?

A Yes.

Q And then you stayed in your room for about an hour.

A About an hour.

Q And at 11 o'clock you came back.

A Yes.

Q Correct?

A Yes.

Q Would you tell me exactly what you did when you came back at 11 o'clock that morning, in the pantry?

A In the pantry?

Q Yes. What was the first thing you did when you went back into the pantry at 11 o'clock?

A I took all the cups, put them in the sink, made soapy water.

Q You filled the sink full of soapy water to wash the cups.

A To wash the cups.

Q Those are the cups that the crew had used during the coffee break.

A Where the sink are there is a little table like in between the sink. I have to clean that.

Q Okay.

A Make coffee for lunch hour.

Q Make coffee for the lunch hour. Do you have some coffee urns in that room, in the pantry, coffee machine?

A Coffee urns, yes. Come coffee time. And what remains from the coffee for lunch hour.

Q Right.

A Went down, get a few stores, such as milk, spring onions, onions, radishes, butter and bread.

Q How long did all that take you?

A Well, abotu four or five, six minutes.

Q Did cleaning the coffee cups take you five or six minutes?

A I just put them in the sink.

Q And let them soak.

A Let them soak there.

Q Okay.

A With the hot water.

Q Then you went down below and you got the stores.

A Yes.

Q You brought the stores up?

A I brought the stores up.

Q And did the crew messman come in and get his stores?

A I put them on the side for him to pick up.

Q The officers messman, did he come into the pantry to get his stores?

A Yes.

Q Then what did you do, Mr. Balecha?

A Around 11.20 I went out the pantry leading into

the crew mess.

Q This is your third trip through the crew mess that morning, is that right?

A The third?

Q The third trip.

A From 6.30?

Q Yes.

A It could be four, it could be five. When I get out -- when I go to my room, I goes out there.

Q You go through the crew messroom on your way down to your room?

A To my room.

Q And you come up through the same route?

A Through the same route.

Q You cross through thecrew messroom.

A Yes.

Q Was it dry on every one of those trips?

A Dry.

Q Now, when you go to your room, do you use a stairway in the crew messroom?

A Stairway is behind this bulkhead here (indicating).

Q When you say "bulkhead," what are you talking about?

A Wall, bulkhead.

Q The ladies and gentlemen of the jury would understand a bulkhead to mean a wall, is that correct?

A Yes.

Q And when you say "bulkhead," do you see a wall or a bulkhead in this photograph here (indicating)?

A Yes.

Q That's the one right next to the refrigerator?

A No. Much closer to the doorway leading down.

Q You got some steps that go down here, like that (indicating).

A Closer to the door.

Q Closer to the door.

A About a yard from there. And then there is a stairway going down.

Q Okay.

A Leading to the crew's quarters.

Q So you used this route on a number of occasions that particular morning.

A Yes.

Q Four or five times, maybe.

A Yes.

MR. CARR: May I show the jury this photograph?

THE COURT: Yes.

(Pause)

THE COURT: Continue questioning. I am sure it won't distract them from looking at a picture.

Q At 11.20, when you picked the garbage can up -- by the way, is the garbage can shown in the photograph? Do you see the garbage can in any of those photographs?

A I don't notice it in that photograph.

Q How big was this can?

A About five to six gallon, if you fill it up full.

Q Five or six gallon can. Is this the can here (indicating)?

A That's right. This is the door leading to the crew mess.

Q The door in the back of this photograph is the door leading into the crew mess.

And the can you identified is one right next to the counter, or the table on the lefthand side.

How much did that can weigh that you picked up and carried out the third time that morning?

A I carried only about half full.

Q How much did it weigh?

A About less than twenty pounds, maybe.

Q Less than twenty pounds?

A It all depends what its contents. Garbage is

lighter than water. If they make coffee and put the coffee grinds in it and then rains, the coffee urn, they all put in there. It all depends how it is accumulated.

Q I understand. But how was it accumulated that morning? What was in there?

A Lunch hour, you mean?

Q No, before lunch hour.

A At six o'clock?

Q No, sir. I'm sorry. At 11.20 that morning.

A At 11.20?

Q When you picked up for the third time.

A About twenty, twenty five pounds.

Q Twenty or twenty five pounds.

A Maybe.

Q Coffee grounds?

A And water, garbages, accumulated garbages.

Q All right. With that can in which hand? In which hand were you carrying it? In your right hand?

A In my right hand.

Q With that can in your right hand, you walked from the pantry into the crew messroom, is that correct?

A Right.

Q And as you stepped into the crew messroom, what did you see?

A I saw the crew messman.

Q Mr. Norwood?

A Mr. Norwood.

Q What position was Mr. Norwood in?

A He was beiding over with a mop handle in his hand.

Q With a mop handle in his hand?

A Yes.

Q What was he doing with the mop handle?

A Swinging back and forward sideways, swinging it like mad.

Q On the deck?

A Yes.

Q Like that (indicating)?

A Like that.

Q Where was he doing that?

A He was -- he told me he was drying that day.

Q Never mind what he told you. I want you to tell us what you saw.

A I saw him mopping.

Q You saw him mopping. And I asked you where did you see him mopping.

A Just a little farther down here --

Q Down about here (indicating)?

A Close to the refrigerator.

Q Here is the refrigerator (indicating).

A Right.

Q Where did you see Mr. Norwood doing his mopping?

A About two and a half to three feet from the refrigerator.

Q What direction was he moving?

A Backward, towards --

Q You saw him like this (indicating)?

A Yes.

Q All right.

A Backward to the wall, close to the refrigerator.

Q So all this mopping was in this area (indicating)? Or was he moving down in this direction (indicating)?

A He come from the wall, port side wall. He came from there, backing up.

Q Backing up.

A Backing up towards the refrigerator.

Q Came from the port side --

A In between the two tables, the table in here --

THE COURT: Could you approach the bench?

(Discussion off the record at the bench.)

Q I simply want to know, Mr. Balecha, when you stepped into this pantry, was Mr. Norwood facing you or was

his back to you?

A His back towards me.

Q His back towards you. And there are tables in this room?

A Yes.

Q And was he preparing the tables for lunch?

A Prepared already.

Q They were already prepared.

A Set.

Q And you said he was mopping in between two tables?

A A little table and a big table.

Q Which is closer to you as you come in the door, the little table or the big table?

A Two big tables.

Q Two big tables?

A Two big tables.

Q As shown in this photograph (indicating)? The two tables that are shown in this photograph, are those the two big tables?

A Yes. He mop in here, all the way down here. This is the refrigerator, here is the bulkhead, and he was here (indicating).

Q He was down in between the two tables?

A Not the two. The little table is in front here.

MR. LEVINE: Your Honor, might I move up? I can't see what Mr. Carr is showing him.

THE COURT: Sure. Sit where you want, as long as you don't obstruct the jury.

A (Continuing) Close to the bottom, the little table.

Q Where is the little table? Could you just stand up and show us, please?

A Down here (pointing).

Q Down here?

A Down here (indicating).

Q A little table?

A By the wall.

Q Like that (drawing)?

A They took off one chair.

Q All right. This is the position of the little table.

A Yes.

Q Where was the big table? Was it next to it?

A A little up.

Q Like this (drawing)?

A A little up. In here you get the refrigeration, in here, down in the corner here (indicating).

Q I am not worried about that right now.

A Teh big tables is up.

Q Another big table up here (indicating)?

A Another big table up there.

Q All right (drawing).

A This table is a little more up (indicating).

Q This one should be up here a little further. Where was he mopping? Between the big table and the little table?

A Yes. But that table is more up, way up, close in front of the refrigerator.

Q Liek that (drawing)?

A Like that.

Q Okay. And in here there is a space between the big table and the little table, right?

A Right. They are close, about maybe a yard and a half or a yard, something like a yard and a half.

Q And he was mopping it here and moving towards the bulkhead.

A The bulkhead.

Q Okay. Was he using a wet mop or was he using a dry mop?

A Before he started to mop, in order to dry the deck, a floor, you have to use a dry mop. When that mop is

used and the wet water, naturally the mop has to be wet and he has to dry that mop.

Q The mop has to be wet.

A Though it is dry before he starts to mop. He has to dry the deck, the floor.

Q He takes the dry mop to clean up the floor.

A To clean up.

Q And as he mops, the mop gets wet.

Where were you looking as you started to walk?

A Towards Norwood.

Q Were you looking at the deck?

A Before I started to walk.

Q As you started to walk, were you looking down at the deck?

A I took a fast look on the deck.

Q Pardon?

A Before I started to walk --

THE COURT: Five more minutes, Mr. Carr, no more.

Q You took a fast look.

A I took a fast look on the deck because my eyes towards Norwood swinging the mop handle back and forth.

Q You took a fast look at the deck.

A If there is any object lying on it that I might

slip on it.

Q You were also looking to see whether the deck was wet or not, weren't you?

A I couldn't tell the deck is wet because when I asked Norwood if it's okay, "is it okay?" that means asking him if the deck is clean or dry, because he told me he is mopping the deck. He said,"The refrigerator is leaking again and I have to dry it up."

Q Let's forget about the conversation. When you started to walk, did you look at the deck to see whether it was wet or not?

A Yes.

Q And what was it? What did it look like to you?

A It looks clean and shiny. I couldn't tell whether it is wet or dry because the light is too bright.

Q It looked clean and shiny.

A Looked clean and shiny.

Q Did it look wet?

A It doesn't look wet.

Q And that's what you saw when you took that fast look?

A That's what I saw.

Q And when you started to walk, how did you walk?

A Regular.

Q Regular?

A Regular. Not fast, not slow.

Q Were you walking right alongside the refrigerator?

A In front of the refrigerator.

Q Okay. And you say at one point your foot slipped?

A My right foot slipped and lost my balance.

Q And you fell against the bulkhead.

A Bang (indicating).

Q Bang, you fell against the bulkhead.

A Yes.

Q You didn't fall down, though, did you? Did you fall down?

A Norwood grabbed me. No. I bended down. I was -- if Norwood had not hold me, I would have feel down.

Q But you didn't fall down, did you?

A Up to the knee, yes. But I didn't really fall down to the deck, if that's what you mean.

Q That's what I mean.

A No, not to the deck.

Q You did not fall to the deck.

A No.

THE COURT: How was the weather that morning?

THE WITNESS: Well, according to my experience

at sea, sir --

THE COURT: How was it that morning? Not according to your experience at sea. How was it?

THE WITNESS: It was good.

THE COURT: Calm sea?

THE WITNESS: No, sir. As we -- when the ship is in water, no matter how quiet --

THE COURT: That morning.

THE WITNESS: It was good, sir.

THE COURT: All right.

BY MR. CARR:

Q You say when the ship is in the water, no matter what, is the ship always moving a little?

A It is moving.

Q And you take that into account when you walk.

A I take that into account. I'm used to the ocean, for over thirty years being a seaman. I consider it is fair.

Q Over thirty years being a member of the Steward Department.

A Yes, sir.

Q Are you eligible for retirement now?

MR. LEVINE: Objection, your Honor.

THE COURT: Yes. And that is your time limit,

Mr. Carr.

MR. CARR: I have a few more questions.

THE COURT: I'm sorry. You had this witness under cross examination for about an hour and a half.

MR. CARR: Sir, I just started this morning.

THE COURT: The man slipped and fell. No, you are through.

Any rebuttal?

MR. LEVINE: No, sir.

THE COURT: All right. Next witness.

MR. CARR: Your Honor, I would like --

THE COURT: You are excused.

MR. CARR: I would like to question the witness about the --

THE COURT: No. I've warned you. I told you four times. You are through.

MR. CARR: -- the refrigerator door.

THE COURT: No, Mr. Carr. Sit down.

(Witness excused)

MR. LEVINE: Your Honor, I wish to read one item to the jury on the defendant's answers to interrogatories. The question asked was: What were the wages paid to Mr. Balecha for the period of time he was working aboard the Carbide Texas City?

The answer was: "Plaintiff was employed as Pantry Utility on a voyage from March 8th to April 16, 1972 at a base wage of $430.11 per month, at $2.72 per hour overtime. Plaintiff's papers overlapped voyage 237. He was paid from March 8th (Voyage 236) through a portion of Voyage 238 until April 16, 1972, for a total of $964.91."

With that, your Honor, plaintiff rests.

THE COURT: All right. The jury may take a very short recess.

(The jury left the courtroom.)

THE COURT: All right, Mr. Carr.

I will not require argument.

MR. CARR: At this time the defendant would like to move to dismiss the complaint with respect to the negligence phase of the case. Apparently the only claim --

THE COURT: I said I wouldn't require argument. Just make the motion.

MR. CARR: I make a motion to dismiss the complaint based on the Jones Act cause of action.

THE COURT: Denied.

MR. CARR: I also make the same motion with respect to the unsezworthiness cause of action.

THE COURT: Denied.

All right. Recall the jury.

(Jury present)

MR. CARR: Mr. Doore, would you take the stand, please.

G E O R G E D O O R E, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARR:

Q By whom are you employed?

A Marine Transport Lines.

Q What is your position?

A Third mate.

Q How long have you been a third mate?

A Four years.

Q Speak up a little louder.

A Four years with Marine Transport Lines, on that ship.

Q What ship are you talking about?

A The Carbide Texas City.

Q Do you have any duties on the Carbide Texas City with respect to preparing accident reports?

A Yes, sir, I do.

Q Did you prepare such an accident report with

respect to Frank Balecha?

A Yes, sir.

Q When did you prepare that report?

A The date on the report, I believe, is July.

Q I show you Plaintiff Exhibit 9 in evidence. Will you tell us the date of that report?

A 8 July 1972.

Q Will you describe the circumstances under which you prepared this report?

A Mr. Balecha came to the midship house on this date and requested a Master's certificate to go see about his shoulder. Every time that somebody wants a Master's certificate for an injury, we always make out an accident report or illness report, accidental injury.

Q Was that the first such request by Mr. Balecha for medical treatment ashore?

A Yes, sir.

Q Did you have anything to do with the preparation of the bottom of that report, titled "Investigation"?

A Yes, sir.

Q When was the first time that Mr. Balecha informed you that a refrigerator had been leaking?

A On that date.

Q On what date?

Q On what date?

A 8 July.

Q Before 8 July 1972, had Mr. Balecha at any time mentioned an injury to his shoulder?

A Yes, sir.

Q When did he first mention an injury to his shoulder?

A I don't --

Q Under what circumstances?

A The day after he actually injured his shoulder. It was theday that he cut his finger washing dishes.

Q At the time he cut his finger washing dishes, did you supply first aid?

A Yes, sir.

Q For the finger.

A For the finger.

Q And after you had supplied first aid for the cut finger --

A Yes, sir.

Q -- did he say anything about his shoulder?

A Yes, sir. As an afterthought he mentioned that his shoulder hurt and he would like some Ben Gay for his shoulder.

Q Is that the extent of the conversation you had

with him at that time about his shoulder?

A Yes, sir.

Q And it was not until July 8, 1972 that he first mentioned anything about a leaking refrigerator?

A YEs, sir.

Q At that time, about three months later, what, if anything, did you do about that claim he had made?

A About the leaking refrigerator?

Q Yes.

A I just put it in the investigation section as if the refrigerator had actually been leaking. But after this was all finished, after the report was made out, I then went and asked the chief engineer if the refrigerator had been fixed and he told me that it had.

MR. LEVINE: I'm sorry. I didn't hear the end. The door was opening, your Honor, and there was noise out in the corridor. I heard --

THE COURT: Would you repeat it?

(Answer read)

BY MR. CARR:

Q When the report mentions that the refrigerator had been leaking, was this based on your personal observation?

A No, sir.

Q What was it based on?

A On Mr. Balecha's statement.

THE COURT: Did the engineer tell you he had repaired it?

THE WITNESS: Yes, sir. He told me he had repaired it.

THE COURT: Why did he repair it, if it had not been leaking?

THE WITNESS: It had been leaking prior to this accident, sometime in 1971, I think, and the chief engineer, when I asked him when it had been fixed, I think he must have been thinking about that.

MR. LEVINE: Objection.

THE COURT: Yes, what he thought. Strike it.

BY MR. CARR:

Q Now, did you have anything to do with the preparation of a report of personal injury involving Mr. Balecha's left hand?

A Yes, sir.

Q In March of this year.

A Yes, sir.

Q I show you this document and ask if that's the report you prepared.

A Yes, sir, it is.

MR. CARR: I would like to offer that in evidence, your Honor, as defendant's next exhibit.

MR. LEVINE: May I see it, your Honor?

THE COURT: I assumed you had seen it long before.

(Pause)

MR. LEVINE: No objection.

THE COURT: Received.

(Defendant's Exhibit E for identification received in evidence.)

xxx Q Does this particular report contain a description of the accident as given to you by Mr. Balecha?

A Yes, sir, it does.

Q Does that description bear his signature?

A Yes, sir.

Q At the time he reported to you the hand or finger injury, did he make any reference to his shoulder being involved in that particular accident?

A No, sir not at that time.

Q Do you keep a medical log on this particular ship?

A Yes, sir, I do.

THE COURT: We'll take a short recess at this point. The Court has another matter that it must tend to

now.

(The jury left the courtroom.)

THE COURT: Could counsel come up, please?

(Recess)

(Jury present)

DIRECT EXAMINATION CONTINUED

BY MR. CARR:

Q I show you these documents and ask if you will identify it for us.

A These are medical logs and the first one is the month of March, the month of April, these are 1972, May, June, and the second page for June, and July, and October '72 and the month of March 1973.

Q Are these records kept in the regular course of the ship's business?

A Yes, sir.

(Defendant's exhibit F was marked for identification.)

xxx

MR. LEVINE: No objection.

THE COURT: Received.

(Defendant's Exhibit F for identification received in evidence.)

xxx

MR. CARR: I have no further questions, your Honor, of Mr. Doore.

CROSS EXAMINATION

BY MR. LEVINE:

Q Mr. Doore, I believe you testified that the day after this -- that would be March 28th -- Mr. Balecha advised you about a finger and about the shoulder.

A Yes, sir.

Q And you gave him treatment for the finger and you gave him treatment for the shoulder.

A Yes, sir.

Q Now, all treatment, I assume, goes i nto the medical log.

A All treatment is supposed to go in the medical log.

Q Do you keep the medical log?

A Yes, sir, I do.

Q Will you show me, Mr. Doore, on March 28 where the treatment to the shoulder is listed?

A It is not in here.

Q But you did give him Ben Gay.

A Yes, sir, I did.

Q Now, Mr. Doore, Mr. Balecha testified that on several occasions thereafter he also received Ben Gay from you. Is that true?

A YEs, sir, that is true.

Q And that was for his shoulder.

A Yes, sir.

Q So that the first information you had about the shoulder was not in July, when you made up this report, was it?

A No, sir.

Q Just one question and I'll be done with you. What is the hasp? I don't understand what the hasp on a door is. I show you a photograph of the door and ask you if you can point out the hasp to me, sir. Here are two photographs. Will you point out the hasp to me?

A (Indicating).

Q That is the hasp. I see.

A Yes.

MR. LEVINE: All right. Fine. I have no further questions, Mr. Doore.

MR. CARR: Thank you, sir.

(Witness excused)

- - -

THOMAS BRITTON, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CARR:

Q Mr. Britton, by whom are you employed?

A Marine Transport Line.

Q What ship do you work on?

A Carbide Texas City.

Q How long have you worked on the Carbide Texas City?

A About twelve years.

Q In what capacity?

A Chief steward.

Q Are you assigned to that vessel at the present time?

A Yes.

Q As cheif steward, how many men do you have working under you on this ship?

A Seven.

Q Do these men have a duty with respect to reporting of accidents, if an accident occurs to them?

A That's correct, yes.

Q Who are they supposed to report an accident to?

A To the supervisor, the head of the department, which is the chief steward, and then the steward reports it to the medical officer, which would be the third mate.

Q During yourservice aboard the Carbide Texas City, has Mr. Bladecha ever reported an accident to you?

A He have never reported an accident to me and I have never known of the accident until this date.

Q When was the first time you were aware that Mr. Balecha had been involved in an accident involving his shoulder?

A I have never.

Q Well, you are in court today to give testimony. When is the first time you had any knowledge that he was claiming this?

A The first time I had knowledge of the claim was I received a letter from an attorney saying that Balecha have an accident and would like to know if I would testify.

Q How long ago was that?

A This has been three weeks ago.

Q Okay. Did Mr. Balecha ever mention it to you on the ship at any time?

A Never have mentioned it to me.

Q Now, as Pantryman, which is the job Mr. Balecha had up until January of this year --

A That's correct.

Q -- did part of his duties involve the carrying out of garbage?

A Correct.

Q Did you ever give him any orders as to what route

he was supposed to take in dumping garbage?

A I have never mentioned any route whatsoever.

Q Was there ever a time when you told Mr. Balecha that he could not use the route that takes him through the galley and out the back door?

A I have never, never have.

Q Had you ever seen Mr. Balecha use that actual route through the galley to dump garbage?

A Several times he have used it, yes.

Q You have seen it personally?

A Personally, yes.

Q And did you say anything aboutit when he did?

A Never have.

THE COURT: Where was the garbage pail kept as you used it, in the galley or the pantry?

A The garbage pail is in the pantry and we use it by the way of the galley, or either exit to the outside, port or starboard side of the ship.

Q On this diagram, where we have the pantry and the galley and the door that enters into the galley from the pantry, where the garbage can kept?

A It is near the door that enters to the galley.

Q Where would it be? On this side of the door or on this side of the door (indicating)?

A It would be on the opposite side, which would be on the pantry side of the door.

THE COURT: Draw it. Give him the chalk. Where is the garbage can?

Q Put a circle there where the garbage can is kept in the pantry?

A It would be on this side (drawing) of the pantry. It was the inside of the pantry.

Q Now, had you ever issued any orders to Mr. Balecha about carrying garbage out through the crew mess-room?

A Never have mentioned to him carrying through the garbage. But in a way of speaking, if we would mention it, it would be unhealthyto carry through the crew messhall. But I have never mentioned to him about anything.

Q One way or the other?

MR. LEVINE: I'm sorry, your Honor. I did not understand teh answer. May I have it read?

THE COURT: Would you read the answer?

(Answer read)

Q Now, back in July of 1972, did Mr. Balecha leave the ship?

A He left the ship. He reported to me that he wanted a sixty day vacation relief.

Q When was that? What month?

A This was in July.

MR. LEVINE: I object to what Mr. Balecha reported to him unless it is substantiated by a written document.

THE COURT: Over ruled.

Q This was in July of '72?

A Right.

Q And at that time he requested a sixty day vacation leave?

A Sixty days vacation relief.

Q Before he requested his vacation relief, did you observe him in going about his normal duties?

A Yes. Since he be abaordship, he have always did hsi duties.

Q Did those duties include the carrying of stores?

A His regular routine of duties. He have always did this.

Q Did he ever get any overtime for this work?

A Well, the only time that overtime is involved, which we call control overtime, is that where we are taking on stores, which is in Texas City, we takes on fresh vegetables and milk. And most of the time, if he is available, we use him for handling stores, if he would agree to work.

Q And did he agree to work on occasion?

A Several occasions he have.

Q I show you this photograph, Mr. Britton, and ask if you can identify it for me.

A This is the area we call the dry storeroom, which is connected to the iceboxes, which is one icebox is the chill icebox, and inside of the chill icebox is the meat refrigeration, and this is what you call below the galley area.

Q It is one deck below the galley?

A Right.

Q When the ship is rolling, is there a proper way to come out of this door?

A Yes; by safety purpose.

Q What do you mean by that?

A That is either hook the door --

Q Hook the door?

A Hook the door.

Q Is the hook shown on this particular photograph (handing)?

A Yes, the hook is showed on this photograph, which is mainly the chillbox door and is hooked to the wall of the refrigeration --

Q Would you describe for me the proper manner for

coming out of this door when the ship is rolling?

A Well, the proper manner for coming out of the chillbox, if the ship is rolling, which is generally speaking, you must put down whatever heavy, or whatever you are carrying, unless it is light, set it down and then open the door proper, go outside of the chillbox and hook the door behind -- hook the door behind with the latch, which latches to the wall of the chillbox. And after you get the things that you have, which is heavy, I say, then you will close the chillbox door back properly, which is two dogs hooks, one top and one bottom.

Q Is this door difficult to handle when the ship is rolling?

A Yes, it is, because it is heavy.

Q How much would you say that door weighs?

A Close to three thousand pounds, I guess.

Q Three thousand pounds?

A I would say somewhere there, or less. I actually wouldn't know. But I do know it is heavy.

Q Did Mr. Balecha ever complain to you about his shoulder while he has been working stores or doing any of his work on the ship?

A To my knowledge he have never complained to me concerning his shoulder doing his work.

MR. CARR: Thank you.

CROSS EXAMINATION

BY MR. LEVINE:

Q You are familiar with a document called a Master's certificate, arent' you?

A Yes.

Q And you are also familiar with the fact that a Master's certificate is given any time a merchant seaman desires medical treatment at any time during a voyage or at the conclusion thereof?

A At the same time I have no rights to say about a Master's certificate. I don't give them out.

Q I didn't say you did, Mr. Britton. I am just asking you if you are familiar with them.

A I am familiar with them, yes.

Q Do you know, Mr. Britton, that Mr. Balecha received a Master's certificate on July 10, 1972 at the time when you said he was getting off for a vacation?

A I did not know he received one.

MR. LEVINE: Referring now to Plaintiff's Exhibit 2 in evidence, I read therefrom:

"Master's certificate of service to the United States Public Health Service, Staten Island, dated 10 July 1972. Name Balecha, Frank D. Z No. 561475. I hereby

certify that the above information is true to the best of my knowledge and the person named herein as the applicant has in my presence signed his name in the blank space provided below for his signature."

And then, typed in by the officer aboard the vessel, "Man wants examination of left shoulder, which has been giving persistent pain for approximately three and oen half months." Signed "T. H. McBane, Master."

Q Who is Mr. McBane?

A He is the Captain.

Q The Captain. Now, Mr. Britton, you are familiar with Mr. Doore, aren't you?

A Mr. Doore?

Q Mr. Doore.

A Only knowing him as third mate.

Q And the third mate is the medical officer, isn't he?

A Yes, he is.

Q Mr. Britton, would you be surprised if I told you Mr. Doore testified just ten minutes ago, saying that on March 28th and thereafter on several occasions he prescribed and gave Ben Gay to Mr Balecha for his shoulder?

MR. CARR: I'll object to the form.

THE COURT: Sustained.

MR. LEVINE: I have no further questions.

MR. CARR: One question.

THE COURT: I might say, counsel's questions aren't evidence.

Go ahead.

MR. LEVINE: I'm sorry, sir?

THE COURT: Read it back, please.

(Record read)

REDIRECT EXAMINATION

BY MR. CARR:

Q In the year 1972, did you have any knowledge yourself as chief steward of any leaks involving the refrigerator in the crew messroom?

A In 1972, not to my knowledge. But I do know in 1971, previous, before we went to the shipyard, we did have a leak in the crew refrigerator, and in '71 it was repaired and replaced.

Q In the shipyard?

A In the shipyard.

Q And after the ship came out of the yard in '71, did you have any more trouble with that refrigerator leaking?

A Not to my knowledge, no, no leaks after that.

MR. CARR: No further questions.

RECROSS EXAMINATION

BY MR. LEVINE:

Q When it was repaired and replaced, that wasn't done by the engineer, was it?

A It was not done by the engineers. It was done by the refrigeration ashore.

MR. LEVINE: No further questions.

THE COURT: You are excused.

(Witness excused)

MR. CARR: No more witnesses, your Honor.

THE COURT: I take it you renew your motions, Mr. Carr.

MR. CARR: Yes, sir, I do.

THE COURT: I make the same rulings. Sum up.

Any rebuttal?

MR. LEVINE: No, sir.

THE COURT: Sum up.

MR. CARR: YourHonor, could we have the rulings on the requests before we sum up?

THE COURT: I will grant most of them in substance.

MR. CARR: Thank you.

Ladies and gentlemen, this has been a brief

trial. It has not been a trial that is completely free of contest or dispute, however. My review of the evidence for you, and that is my purpose in standing here now, is to try to capsulize what has taken place i n the last day and a half. It seems to me that there are some areas where there is no dispute, and perhaps I should mention those areas first.

The areas where we have no dispute involve Mr. Balecha's earnings. I think in 1972 there is a document in evidence showing that he made $2,900, approximately. That was last year. In 1971, the year before the accident in suit, he made $4,200. And in 1970 he made $3,400. His earning level, therefore, despite all that we have heard, is fairly consistent, ranging between $4,000 in 1971 to $5,000 in 1970.

Now, there is another thing that I don't think there is any dispute about, and that is before and after the incident that is supposed to have taken place, in the presence of only one man aboard this ship, a man by the name of Norwood, before and after that accident Mr. B alecha had no difficulty in carrying out his normal duties. It is somewhat surprising to me to find Mr. Balecha coming into court and attributing the problems taht he has had since that time back to the incident in March, March 27,

1972, because I don't think that Mr. Balecha has been completely candid with us.

There is an entry in the medical records, one of plaintiff's exhibits, in which he had mentioned that he had injured his left shoulder ten years ago. That fact is there, spelled out in the medical records, when he was visiting the physical therapist in September of 1972.

At the same time he also said: "I injured my shoulder one month ago," which would have been August of 1972. And I don't think Mr. Balecha was completely candid with us either when he said that when he fell on a freshly mopped deck up in the union hall, his left shoulder was not involved, becuase you also heard evidence from the union's medical records that at that time he sustained a sprain of the left shoulder.

Dr. Golub has talked about wear and tear, normal wear and tear that we experience as we go through life and how this normal wear and tear can cause all kinds of things in a person who is Mr. Balecha's age and who has been working the best part of his life.

So far as I know, there is only one man who has come into court and said anything about a rotator cuff injury. That is Dr. Golub. And yet Dr. Goldberg, who is

plaintiff's other chief medical witness and who mentioned the fact that he had offered such a conclusion when he first wrote up this case, had the forthrightness and the candor to come into court and say: Well, I put that in my report, but I have changed my opinion now as to a rotator cuff tear.

And I asked him this question yesterday:

"Q Based on the man's medical history and his work history since the accident, the date you first saw him, what is your belief as to whether or not he sustained a partial tear of the rotator cuff?"

That is that muscle mechanism that has been described a number of times for you. Dr. Goldberg's answer was:

"Given his history subsequent to my examination, I do not feel he sustained a tear of the rotator cuff."

What are we left with? We are left with something that the Marine Hospital has referred to as a frozen shoulder. Nowhere in the Marine Hospital records is the word "rotator cuff" used, suggested or implied. They talk about a frozen shoulder, the type of thing that Dr. Golub said normally works out in a year or two.

Can it happen in individuals without trauma? It can happen in women, men, despite their age. It can

even happen to someone who is lying in bed for an extended period of time. You are going to be asked to decide whether Mr. Balecha sustained anything more than a contusion on that morning in March 1972 when he said he bumped his left shoulder against the bulkhead, or the wall, as he was walking out that door.

What you also have before you is very eloquent evidence as to what he has been doing since the accident and whether the kind of work he has been doing is consistent with an injury such as it has been alleged he has in this case.

I think perhaps the document that speaks best for all of this as far as his injuries are concerned is that medical record taken only a few days ago at the Marine Hospital. At that time Mr. Balecha, on the 26th day of September, which is just last week, went over to the Marine Hospital and it was noted in that record that he has been on active P.T., that he feels better, with less discomfort, and has an increased range of motion, this despite the fact taht nothing besides P.T., or physical therapy, has been done for him aside from caryring out his normal duties.

The examination at that time showed abduction of the shoulder to 130 degrees (indicating), external rotation to 70 degrees, which Dr. Golub, the orthopedist

called by the plaintiff in this case, said was just about normal, full flexion, full extension and full internal rotation.

This examiner last week at the Marine Hospital goes on to state that he has been improving so much since his last visit and will continue on conservative treatment.

Mr. Balecha also was well advised to tell the doctors at that time that he didn't want any kind of manipulation performed on his shoulder, and I think Dr. Golub readily agrees and maybe even has advised him along these lines.

But getting to the real nub of this case is this incident that supposedly took place on March 27th of 1972. Mr. Balecha said that on that particular morning alone he had crossed through this pantry five times one way or the other, either going out to dump garbage, going to his quarters down this ladder, coming up from his quarters, back and forth had crossed that crew messroom deck that morning and noticed that the deck was bone dry on each occasion.

And yet he says, at 11.20, with his garbage can half full, after having dumped it twice already that morning, he made his third sortie through this particular crew messroom and as he stepped into the pantry he observed

Mr. Norwood mopping between a little table and a big table and backing up on his way over to this bulkhead (indicating). That is the testimony you heard this morning.

What did Mr. Balecha do when that had occurred two days earlier? He stopped, he turned around, he took his garbage can back to the pantry, and he waited until Mr. Norwood was finished his mopping chores.

Does it sound consistent to you that a leaking refrigerator -- because that's what Mr. Balecha is claiming in this case -- is going to be bone dry for the first four hours that morning, for thefirst five hours, and yet suddenly is going to start leaking at around 11.20, coincidntally, at the same time that Mr. Norwood is mopping in here?

Mr. Norwood, it will be recalled, has a duty to keep that messroom clean at all times, and that includes spills, spills that might even occur over here on these tables as he is setting up for lunch. Mr. Norwood is the man Mr. Levine mentioned in his opening was negligent, the crew messman was negligent, in the way he maintained that crew messroom. And yet Mr. Balecha has testified that he kept that messroom like he kept his own house, nice and clean and shining all the time.

Now, a man who has been going to sea for thirty

years and sees a man mopping in the crew messroom and who has some garbage in his can is not supposed to leave his common sense behind. He has one of two options. He can walk over the freshly mopped deck or he can turn around and put his garbage can back here or perhaps, a third option, he can go through the galley. And that's the big question in this case, whether, if Mr. Balecha as he entered the crew messroom, sees something going on in there that might alert him as to a dangerous condition, whether he should use his head, turn around and go back and use his alternate route through the galley.

Mr. Balecha says he had been told by the steward when eh came on the ship that he was not allowed to do that kind ofthing. And yet you have heard Mr. Britton testify this morning that he had never instructed Mr. Balecha to stay out of the galley. As a matter of fact, Mr. Britton has seen Frank Balecha walking through the crew galley on a number of occasions for just this purpose, to dump the garbage over the side of the ship.

It is a very simple, uncomplicated issue when you boil right down to that fact, when you boil right down to the fact whether Mr. Balecha used his head and exercised the degree of care that a seaman with his experience is supposed to exercise under conditions that were

obvious and apparent to him that morning. Those conditions were the same that had existed two days before, when Mr. Norwood was mopping that deck.

He turned around and he went back to the pantry. This morning he decides he is going to try to go through. Well, he didn't have that kind of success back in the union hall when he slipped on a freshly mopped deck, and with the man swinging a wet mop in front of him he knows, just as well as you and I know, that that floor is going to be damp after the deck is mopped.

What Mr. Norwood was doing at the time was maintaining his deck and keeping it in a seaworthy, fit and reasonable condition. That doesn't mean that the next minute, when a seaman walks through there, that the deck becomes unseaworthy. In order to make the area seaworthy and fit, not only for Mr. Balecha if he chose to use that route to go down to his quarters or to dump garbage, he has to keep that area seaworthy and clean because that's where the crew is going to eat in ten minutes, and he has to maintain it in a sanitary way.

You are going to be asked to decide whether it is mr. Britton, who has worked on that ship a number of years, or Mr. Balecha, who has a rather keen interest in this case, who is being completely candid and forthright

in his presentation of the facts.

This is the excuse that Mr. Balecha uses to prevent you from considering whether he should have gone through the galley. The excuse is that the chief steward forbade him to use that route. And yet I think that is the kind of plan or that is the kind of option that is available to each one of us when we see something that might hinder our safety. We have to think of options; we have to think of alternatives.

Mr. Balecha did not use his options that morning. He did not use his alternatives. He decided to walk through that galley, or through that crew mess, and as he did so he says he bumpted his shoulder against the wall.

It is a very simple case, and the defendant wants nothing more than complete fairness in your treatment both of Mr. Balecha and the company that employed him. Remember, at the outset we said that in order for Mr. Balecha to recover any money in this case he must show that someone aboard this ship was negligent or he must show that that crew messroom in some way was unseaworthy, not merely because of the presence of a temporary mopping job but that you had an unseaworthy condition, a leaking refrigerator, which presented a hazard to his safety as he went

about the ship.

So we ask you to be completely fair and completely honest in your appraisal of all the facts as you have heard them, all the testimony that you have heard, and then return with a verdict that you in good conscience can all subscribe to.

Thank you.

THE COURT: Mr. Levine.

MR. LEVINE: With the Court's permission, Mr. Carr, Mr. Foreman, ladies and gentlemen of the jury: As Mr. Carr said, this has been a relatively short trial and I will try to keep the summation relatively short, not because I don't think the case is important but because I think that, with due respect to you people, you have heard the evidence and it should be fairly fresh in your minds.

I want to say at the outset that whatever I say, my interpretation of the evidence, is strictly my interpretation and what I believe I heard, and I assume the same goes for Mr. Carr, and of course the Court has the same privilege to comment on the evidence, but it is our interpretation. You are the sold judges of it when it comes to that.

Let us go over the evidence very quickly. Mr. Balecha testified that he was told that he was not to use the galley to take the garbage out. The chief steward got on the stand there and he testified: Oh, no. As a matter of fact, it is much less healthy to take it out through the mess hall.

You people are intelligent people. Given an opportunity, or given the choice between taking loose garbage through a cooking area or through an area that is not being

used to eat in at that particular time, which is less healthy? It is very obvious that the reason that the cooking area was off limits is because the garbage may contaminate the food, because the cooking area is filled with cooks and bakers and a spillage there might lead somebody to slip and find himself in a pot of hot grease. It is much more dangerous to go through there, it is much more unhealthy, and that is why the rule was set up, despite what our chief steward said.

And let me comment just once more on the chief steward and then I'll let him go. He was very indignant on the stand about the fact that Mr. Balecha never told him anything about any injuries. But he admits that if he had told him, then of course he would have told the third mate and the third mate would treat him, not the chief steward.

You heard the third mate on the stand say, "Oh, yes. The day after this happened, Mr. Balecha told me about this. I gave him Ben Gay then. I gave him Ben Gay on several other occasions." The chief steward says he knows nothing about it. That's his business.

The chief steward made one other remark. Well, we'll just forget about that.

This accident comes down to one thing. Was the deck wet with a residue from the refrigerator? You have a

report from the third mate, not in the section which deals with the statement which says the man should state the cause of injury or the reason for it, the man, the person who is injured, but in the section which deals with "This section to be completed whenever an accident or injury is reported," and the information to be supplied by the reporting officer and the investigating officer, in that section you find the statement that the refrigerator was leaking and that it was repaired shortly after and the deck is no longer wet.

That is not something that we made up. That is not something that we thought up a long time after this accident and came up with a theory on. This is what the ship, its own officers, reported.

Now, the man has the gall to come in here and say: Well, I wrote it down, but it wasn't true. I was talking about a year before.

This is a ship we are talking about. This is the third mate, the fourth man in command of this vessel. Are you going to believe that he wrote this down when it wasn't true? Sure, the refrigerator had been repaired when it was in the shipyard; there is no question about that. It also broke down again, because he said the engineer repaired it. And, if you remember, when the chief steward was on the stand, I said, "Who repaired it?" and he said, "The shipyard."

So you are talking about two different things.

Mr. Carr made one other point that I would like to rebut at this time. Mr. Carr said: "Now, this refrigerator leaked two days before and Mr. Balecha went out there and he turned around and he went back in and he waited." Well, that in essence is what Mr. Balecha said, except it leaves out some rather minor points that I would like to bring out to you, and again I point out to you that this is my recollection of what he said this morning.

The question was asked to him: "Well, what happened when you went out there that time and you saw Norwood mopping?" Mr. Balecha said: "Norwood told me, 'I'm not done. I'll call you when it is safe.' And I went back in and I waited for his call and he called me and I went out."

Mr. Carr would have you believe that this time, having done it the other way two days before, Mr. Balecha walked out there, saw the very same situation and blithely proceeded ahead. But if you heard Mr. Balecha yesterday trying to explain how this accident happened, he said he talked with Mr. Norwood and Mr. Norwood told him, "It's all right. I'm done with that area." That is the difference.

When I said that Mr. Norwood created an unseaworthy condition, what I was talking about was having mopped,

having mopped up the water, the excess water, he had left a film on it, and the film is established by the skid mark that has been described. He left a film on it, which is twice as dangerous as the water itself. That is the unseaworthy condition that Mr. Norwood created, and the unseaworthy condition that the vessel created was allowing this refrigerator to leak. And in both cases the vessel was negligent and there is nothing that Mr. Balecha did that contributed in any way to the happening of this accident except being on the ship.

Now let's talk about the injury and I'll talk about it quickly, if I may. Mr. Balecha received a blow to the shoulder. Mr. Carr described it as "knocking his shoulder on the bulkhead." The description Mr. Balecha gave is that "my right foot slipped, I lost my balance, and I hit myself and," if I recall this morning, "banged the bulkhead with my shoulder."

And he continued to work, receiving this Ben Gay. He is not the most educated man in the world. He has a right to rely on the officers who are over him, and the officers gave him the Ben Gay and "It's just a bruise. Don't worry about it." And this continued for almost two months, until it started getting so bad that it was no longer a bruise to him. The Ben Gay no longer helped him.

So what did he do? Well, if you believe Mr. Britton, he took a vacation. If you believe the records that are in evidence, you will find that the Captain gave him a Master's certificate to go to the hospital. And he went to the hospital and the first time in the hospital the doctor described it as a contusion and he said maybe it is even arthritis. And the hospital records are in evidence and you can read them, and you'll see, if you look, "Arthritis" with a question mark.

Then he went back to the hospital the second time and the second time they said: Oh, no. This is beyond the stage of arthritis. We are going to have this man examined by the orthopedic clinic. And then they sent him to the orthopedic clinic.

Now I'll tell you this. I have gone through these records upside down and inside out and I defy you to find any reference whatsoever to arthritis except for the first physician's questionable report, questionable diagnosis of arthritis with a question mark.

As a matter of fact, that diagnosis was based on an X-ray, and you are familiar with X-rays, you saw them here. That was done at the hospital, and the X-ray report is attached here on one of the last pages of Plaintiff's Exhibit 2, and the X-ray report reads as follows:

"Left shoulder, 7/10/72, comment:" -- this is by the radiologist, the specialist in X-ray readings and takings -- "Individualized bones are intact. There is no soft tissue calcification to suggest calcific bursitis or tendonitis. However, there is some calcification attachment of a tendon to the greater tuberosity. I am not sure of the clinical significance of this finding."

The X-ray man does not say this is arthritis. It is signed "Kenneth G. Carter, M. D."

The United States Public Health never gave a diagnosis of arthritis in this thing. The only person who has ever given a diagnosis of arthritis was Dr. Lodico, who stood there on the stand and told you about arthritis and how he agreed with the hospital records, providing they agreed with him.

When they talked about the limitation of range of motion, Dr. Lodico said, "Your limitation is only up to here, not up to here (indicating), because you would have to twist your arms." So I said, "Doctor, do you want the palms flat down like this or would you rather have the palms flat up like this (indicating)?" But in either event I am twisting something and I am not doing what is supposed to be done.

Dr. Lodico, who disagrees with the American

Medical Association, who says that the range is 180 degrees, says, "I don't like those figures. I use my own." So he uses a range up to here (indicating). And, using that range up to there, what does Dr. Lodico say? Because if this is normal (indicating), Dr. Lodico says, "He presents a 15 degree loss." If this is normal, 15 degrees means he can't raise it above here (indicating). Even our own doctors admit he can go higher than that.

Dr. Goldberg, who is an osteopath who treated this man with massage and heat treatments during the period he was not getting it at the hospital, and whose treatment was correct because obviously the United States Public Health Hospital instituted the very same treatment on the next visit -- Dr. Goldberg said in his opinion it was a capsulitis and a frozen shoulder and he couldn't say a rotator cuff tear because he didn't feel it was.

I have great respect for Dr. Goldberg. He treated this man as he saw him and the treatment was agreed with by the hospital. His diagnosis was as he saw it, and it is always possible to have two doctors with honest opinions of different diagnosis.

You have Dr. Golub, who presented to you his credentials. He is a specialist, and the only specialist that was brought in here in orthopedics. He is an Assistant

Professor of Orthopedics at Mt. Sinai School of Medicine. He is the orthopedist, or one of the orthopedists, at the Hospital for Joint Diseases, which is one of your leading orthopedic hospitals here in New York. He said: "I examined this man not once but twice, and the first time I said it was a rotator cuff injury and the second time I said it is a rotator cuff injury, and I say to you under oath that this man has a rotator cuff tear. It is a partial tear. If he had a total tear, we would have an entirely different and a far more serious position. But we have a condition that the man can live with.

And when I told him about the possibilities of operative intervention by the hospital, which incidentally the hospital had not talked about on one occasion but on several occasions, and I refer you again to Plaintiff's Exhibit 2 in evidence, October 5th, 1972: "Discussed with the patient about prolonged, extended P. T." -- physical therapy -- " and possible surgical procedures if necessary." This was in October of 1972 the hospital is talking of surgery. Is that for arthritis? Have you ever heard of anybody being operated on for arthritis?

This man has an injury which he is grateful will not cripple him for life. So long as he keeps away from certain types of activities, he will be all right. In other

words, he can't give full range of motion. If he keeps his motions down below, he c n manage without undue pain. Once he goes above, what happens? He ends up back at the hospital.

He went and he leaned his arm against the door, which he described as five hundred pounds, which Mr. Britton, and I think Mr.Britton was mistaken on it, described as three thousand pounds, but he leaned against this door and the very weight of the door was enough, bang, to set off the pain again, to such a degree that his whole hand felt as if it went numb.

And we asked Dr. Golub about that and Dr. Golub said: Yes, that is exactly what I would expect.

Did the defendant ask Dr. Lodico? Never.

Dr. Golub and Dr. Goldberg both tell you this man has a condition, when I asked for a prognosis, that is guarded. What does that mean? It means that we are not pleased with the future; we hope it will be fairly good, but it will never be perfect and it may be worse, guarded. So long as he keeps his activities down, he'll be all right. If he goes up, he's got troubles again.

So he's got a permanent condition that will partially bother him for the balance of his life, and for that I come to you now and use that famous word compensation

that Mr. Carr explained to you. There is no workmen's compensation here. We are limited to our action against the shipowner. This is the sole basis for a recovery by this man, this action, and I ask that Mr. Balecha be compensated for three things - out of pocket, pain, and disability.

Now let's talk about them in order. Out of pocket. Medical expenses. Mr. Balecha had only $100 of medical expenses to Dr. Goldberg for a series of treatments that truthfully he should have gotten at the hospital, but nevertheless they didn't give it to him at that time and he underwent it. Out of pocket $100. Medical. All his other medical expenses were at the United States Public Health hospitals, which are free to seamen.

Out of pocket continues. From july 10th, 1972 until October 26, 1972, Mr. Balecha was marked not fit for duty, which means he was not allowed to work because the hospital said he couldn't. That is a period of three and a half months. Keep that in mind.

We have a second period. From March 11, 1972, when he had hit his shoulder and hurt his finger, to May 10, 1973, a period of two months, five and a half months no wages, out of pocket.

Now, what were his wages? Well, Mr. Carr says to you we have a very good record of his wages. In 1971

he earned $4,200. Mr. Balecha testified, and nobody disputed it, that from sometime in August of 1971 until February of 1972 he was attending school and was not getting paid. So we have 1971, seven and a half months, let's make it eight months, $4,200. $525 a month average for the eight months. Assume he worked every day of those eight months.

Then Mr. Carr says: Well, in 1972 he earned $4,900, so he made $700 more, after he was injured, than he made before he was injured, so really he should pay us back. But let's take the $4,900 figure. Well, he was not working because he was attending school until the middle of February. So that's a month and a half. He was out for three and a half months with the injury, so that's four and a half months. So now we are talking of a period of seven and a half, or close to seven, months that he worked for $4,900, which comes to $700 a month.

Mr. Balecha says he makes about $750 a month. The ship reports that from March 8th of '72 to April 16th, the time of his voyage, he made $964.91. Now, I sat and I figured that out. You can figure it out. It turns out to be 39 days, which I figured as a month and one third. At a month and one third it came out to be $742 a month. So we are not inaccurate in our figuring.

We say let's take a medium, an average between

all of them - $740, $525 - $600 a month let's say he earned. He's got five and a half months out. That's $3,300 there -- out of pocket we are talking about. 33 plus 1, 3400. If you want to use our figures, you come up with a figure of a little over $4,100, because we say $750 a month. But we'll take either one, 3400 or 4100 out of pocket.

Pain and suffering. The man obviously was in pain. He was getting treatment, getting P.T., physical therapy, in an effort to get him to be able to use his shoulder, and they kept on reporting -- and look at the records, they are right here -- no improvement, slight improvement.

And when they sent him back to work the first time, I want to read it to you so you understand what was going on: "October 26, 1970," and we'll be done in just a minute, "Only a little improvement with P. T. Been away from work four months and patient wants to try to work as a pastry man on a ship. He may give it a try." That's what the hospital said when they sent him back to work. The record is here.

I say that Mr. Balecha is entitled to $3,400 for his out of pocket, he is entitled to $20,000 for the pain and suffering he has had up to date, and for the pain and suffering in the future another $20,000, and I ask you

to bring in a verdict of $4,000 to recompense Mr. Balecha for his injuries and for what has happened to him and what will happen to him.

THE COURT: We will take a very short recess and then the Court will instruct you on the law.

(The jury left the courtroom.)

(Recess)

(Jury present)

CHARGE OF THE COURT

(MacMahon, J.)

I'll try to be brief, and I don't intend in this case to attempt to summarize the evidence at all. It has been a very short trial and a relatively simple case and it would be an insult to your intelligence for me to try to review the evidence with you.

But essentially this plaintiff claims that back on March 27, 1972, while he was working as a pantry utility-man aboard the SS Carbide Texas City, a merchant vessel, concededly owned, operated and controlled by the defendant; that he sustained injuries while walking across the deck of the crew mess hall because he slipped that the deck was wet and slippery because a refrigerator was defective and wasn't defrosting properly and was leaking; and that he slipped and he started to fall; that he banged his left shoulder against either the door of the refrigerator, which it is my recollection that he testified on direct, but then on cross, I listened to him very carefully, he said the bulkhead. So I leave that to you. In any event he said he struck his shoulder.

He remained on board the ship, as I recall it, until some time in July, when he then left the ship with a

Master's certificate and went to the Staten Island Hospital for treatment and he remained there I think until October. But I leave those to dates to you as to exactly how long. Yes, he remained there until October 26th, and he rejoined the ship at that time and then later on he claims that he was opening the refrigerator and because of a weakness of his shoulder he was unable to stop the door that was swinging toward him, or something, and that he got his finger, his little finger, caught in the door and hurt that at that time and he suffered more injuries and some further lost time because of that.

That's the claim. The defendant denies that this happened at all. The defendant says it didn't happen, and if it did happen it wasn't the defendant's fault in any way.

So the first question you have to decide here is did this accident happen. If you decide that it did not happen, drop your deliberations and return a verdict for the defendant. But if you decide that it did happen, then you have a number of other problems.

The mere fact that the plaintiff may have been injured while working as a member of the crew of this vessel does not entitle him to any recovery at all in this case. Before he can recover, he must show either one or

both of two things: either that the accident and injury were caused by the negligence of the defendant or because of an unseaworthy condition of the vessel or ship.

Now, what do I mean by he must show? I mean that he must prove it. He doesn't have to prove it beyond a reasonable doubt. He only has to prove it by what we lawyers call a fair preponderance of the evidence. And by that I simply mean that he must convince you that his version of what happened here is more likely so than not so.

Now, that brings me to the question of what is negligence. Negligence is simply a failure to use a reasonable degree of care under all of the circumstances of a given situation. The defendant here was under a duty to furnish this plaintiff with a reasonably safe place to work. So you should ask yourself whether the defendant exercised reasonable care -- when I say the defendant I mean the officers and other members of this crew -- to furnish this plaintiff a safe place to work under safe conditions.

Now, that, you will see, turns on some notice to some member of the crew or to some officer that there is the condition that isn't safe, and here the plaintiff says that two days before this accident he walked in through the mess hall, that the messman was mopping, that it was wet. He says that on the morning of the 27th, when the accident

happened, that the messman told him that the refrigerator had been leaking.

So the question on that score is, did the defendant, or some member of the crew, know and were they on reasonable notice, or in the exercise of a reasonable degree of care should the defendant have known, that that refrigerator was leaking? If you find that the defendant knew or should have known that was leaking, and that the condition of the deck in the mess hall was unsafe. Then you must decide whether the deck because the defendant failed to exercise reasonable care.

Now, if you find then that the defendant failed to exercise a reasonable degree of care for the safety and to provide a safe place to work for this plaintiff, then you should find that the defendant was negligent. But if you find that it did under all the circumstances exercise a reasonable degree of care for his safety, then you should find that the defendant was not negligent.

But if you find that the defendant's negligence in the slightest degree, in whole or in part, caused the injuries which this plaintiff sustained, then he is entitled to recover.

Now, that brings me to the question of unseaworthiness. The doctrine of unseaworthiness simply requires the shipowner to furnish a ship and appliances and equipment reasonably fit for their intended use. This is an absolute

duty. The plaintiff doesn't need to prove that the defendant knew or that in the exercise of reasonable care it should have known about this slippery condition. It is enough here that the defendant can't get rid of this duty. It is an absolute obligation imposed by the law. It doesn't turn on knowledge, it doesn't turn on the exercise of reasonable care.

But at the same time the ship isn't required, the defendant isn't required, to furnish an accident-free ship, the standard is not perfection but reasonable fitness for its intended use.

Now, obviously the deck of a ship is intended as a place where men working about the ship can walk, and so the question for you to decide here is whether this deck was reasonably fit for its intended use.

Now, in that connection the mere momentary presence of water or moisture in the area does not in itself render the vessel unseaworthy. Before you can find that the vessel was unseaworthy, the plaintiff must satisfy you by a fair preponderance of the evidence that the wet condition which he claims caused him to slip was not a momentary phase in the normal process of work in and about the crew mess room but that water was permitted to accumulate in sufficient quantity so that the vessel was rendered

unseaworthy.

In other words, the defendant is not required to have a crew member handy with a rag to wipe off and wipe up every drop of water that falls on the deck in the mess room. But a vessel does not become unseaworthy by reason of the temporary condition caused by a transient substance, like water, if despite that the vessel was as fit for service as similar vessels in similar service. The essential test is whether, considering the place and all the circumstances and all the surrounding conditions, the area was reasonably fit to permit plaintiff to perform his task with reasonable safety. That's the key.

If you find that this area was not reasonably fit to permit this plaintiff to perform his task with reasonable safety, then you may find that the ship was unseaworthy. On the other hand, if you find that it was safe, reasonably safe for the plaintiff to perform his task with reasonable safety, then you should find that the ship was seaworthy.

If you find that the defendant was either negligent or that the ship was unseaworthy, then you have some other questions to consider on the subject of damages. On the other hand, if you find that the defendant was not negligent and that the ship was not unseaworthy, if you find

both of them, then you have nothing further to consider; you drop your deliberations.

By discussing damages you are not to conclude that I have any opinion one way or the other about this. The decision here is entirely up to you. I don't mean to imply, by discussing damages, that I think the ship was negligent or that I think the ship was unseaworthy. But if you find either negligence or unseaworthiness and that the plaintiff did sustain injuries, and that his injuries were caused by the fall that he sustained there, then he is entitled to compensation, fair compensation for those injuries and anything that flows directly from them. There must be a logical relationship of cause and effect between his accident and the injuries for which he is seeking to recover here.

Now, if you find that he is entitled then to recover, he is entitled to receive fair compensation. By that I mean he is neither entitled to too little nor too much but to fair compensation, such amount as you find on the basis of the evidence in this case, not as a result of some guess work or sympathy or emotion but on the basis of the evidence, that he has lost for wages that he otherwise would have earned, for any reduction in his future earning power over the period of reasonable expectancy of his work

which I would estimate at 15 to 20 years -- there is no proof before us as to the man's age, as I recall, so you can estimate it by looking at him, on how old he is -- and for his injuries. He is entitled to be fairly compensated for the pain and suffering that he has endured or that he will endure in the future.

Now, he is not entitled to recover here for any medical expenses or anything of that nature. Those have all been taken care of. In this connection, on the finger injury, he is entitled to recover for that if you find that it was a result of, or caused by, a weakness in the shoulder which resulted from the negligence or unseaworthiness of this ship in the first place, in other words that it flowed directly from the first injury and that that injury, that first injury, was caused by negligence or unseaworthiness.

Now, if you arrive at a figure which you think will fairly compensate this plaintiff for those items of damage that I have listed, you come to another principle of law that we have in seamen's cases, and, that is, that once you arrive at that figure you should reduce that figure by some reasonable amount, because money in the hand is worth more than money in the bank. Money in the bank you can get some interest on, so you should

discount it. Let's say you arrive at X dollars now as damages. Then you should reduce it by about six or seven per cent because he gets that money now.

In addition to that you next have to consider whether this accident was caused by the plaintiff's own negligence. Now, if this accident was caused solely by his own negligence, if he was the only one responsible here, the only one at fault, if he just failed to exercise a reasonable degree of care for his own safety, and that was the sole cause of this accident, then he can't recover a nickel.

On the other hand, if you find that he did fail to exercise a reasonable degree of care for his own safety but that his negligence, combined with the defendant's negligence or the unseaworthiness of the vessel, caused the accident, in other words that they are both to blame here, then you must apportion the verdict so as to reduce what you otherwise would have given the plaintiff in the same proportion as his negligence bears to the negligence of the defendant or the unseaworthiness of the vessel.

For example, and by throwing these figures out I don't mean that you are to follow them, suppose that you find that the plaintiff otherwise would be entitled to damages in the amount of $10,000, $20,000, whatever you

say but that the plaintiff was himself half at fault for this, that he was careless and negligent and that his own negligence was responsible at least half. Then you would just simply cut the verdict in half.

Now, in this connection the burden is on the defendant to prove that the plaintiff failed to exercise a reasonable degree of care to protect himself for his own safety, and there again the defendant would have to convince you that what it says about the way the plaintiff conducted himself here is more likely so than not so, and you will recall the arguments and the facts about whether the plaintiff could have gone through the galley, whether he could have put the garbage pail back in the pantry or whether he openly and obviously crossed this wet deck. You will recall that and the evidence about it.

Now, all of us here have different functions. It is my function to preside at the trial, to move it along, to try to keep it on the track and to instruct you on the law that you must apply at the end of this case.

Now, you are not to conclude, from any rulings that I made at this trial or any remarks that I may have made or any nudging of the lawyers that I may have made to move this case along -- you can see we have more business waiting in the back of the courtroom -- that I have any

opinion one way or the other in this case. The decision here is entirely up to you.

The lawyers of course presented their case to you and they have argued it well. Now your function is to decide this case. And how do you go about that? First you should consider all the evidence, the evidence as you heard it from the witness stand and as it is reflected in the written documents which have been received in evidence, the evidence as you remember it. Weigh that evidence in the scale of your reasoning power and decide just where the truth lies in this case.

One of your most important functions is to determine which witnesses you are going to believe. There the first test which you ought to apply is how does the witness' testimony strike you as a matter of your plain, everyday common sense. Has the witness made any inconsistent statements on any earlier occasion from what he is testifying to here? If he has, how important is it? How far does his story check out with the other evidence and what the other witnesses say and, above all, with the physical, written documents in evidence, which can't change their mind just because they are in a courtroom. So you should give particular weight to the written evidence.

Has this witness any interest in the outcome of

This case or has he shown any bias or hostility toward any party or friendship toward any party? Obviously the plaintiff is an interested witness. Obviously he wants to win his case. But I don't mean by that that he is incapable of telling the truth. That's up to you when you weigh his testimony.

Then, probably more important than any of these tests, is the way the witness behaves on the stand. As we go about our daily lives, we have to make judgments about people, whether we are going to believe them, whether we can rely on them, are they dependable, etc. You use that same test here. I saw you watching the witnesses here with particular care. How did they strike you? What kind of an impression did they make? Can you rely on them? Can you trust them? Those are decisions you have to make.

Now, if you find that any witness has deliberately and wilfully lied on the witness stand about any material fact in this case, if you wish you can reject his entire testimony or, if you wish, you can accept as much of it as you believe and reject the rest.

Now, when you retire to the jury room, treat each other with courtesy and with respect, as I know you will. If differences of opinion arise, talk them out.

The American jury system is jury discussion. Remember that you are all entitled to your views and that you are drawn from a cross section of the community, so that there will be differences of view. That's the democratic process. Talk them out with a view to reaching a verdict.

Your verdict here must be unanimous and your foreman will report it in open court orally, either a verdict for the defendant or for the plaintiff; and if your verdict is for the plaintiff, just state the amount. In other words, you will come in and the Clerk will say, "Mr. Foreman," or Mrs. Foreman, whoever it is, "has the jury agreed upon a verdict?" And you simply stand up and say, "Yes, we have. We find for the plaintiff for X dollars" or "We find for the defendant," either way.

Any exceptions, gentlemen? If so, I will hear you at the side bar.

MR. LEVINE: Yes, sir.

(At the side bar)

MR. LEVINE: If your Honor please, I respectfully except to the portion of your charge which says there are no medical expenses which the plaintiff can recover for because he has been reimbursed for them. There is a hundred dollar medical expense which has not been reimbursed.

THE COURT: Well, I wasn't aware of that.

Is that so, Mr. Carr?

MR. CARR: Yes, sir.

(In open court)

THE COURT: I omitted to tell you that there is a $100 medical expense for which the plaintiff has not been reimbursed and he can recover for that amount. I didn't notice it.

(At the side bar)

MR. LEVINE: I respectfully except to that portion of your charge wherein your Honor stated that if the water was momentarily on the floor that this is not unseaworthiness, and to that portion of the charge where you indicated that this was a temporary or transient condition.

THE COURT: I note your exception. You don't state it accurately, but I know what you mean.

MR. LEVINE: I have no further exceptions.

THE COURT: Mr. Carr?

MR. CARR: I have two things. One was the Court's review of the evidence in that the hearsay testimony which was excluded during the trial was referred to and that Norwood had said something about the refrigerator leaking. I think that was excluded during the trial.

THE COURT: My recollection is it wasn't, nor

was there any motion made to strike it, that part of it. And later on you brought it out through your own witness on the defendant's case.

MR. CARR: Nothing about the conversations.

THE COURT: No. You brought out the fact that the thing was leaking.

All right. I note your exception.

MR. CARR: Okay. The other one is that I think there is proof of this man's age in the record.

MR. LEVINE: He is 61.

MR. CARR: He is 61 years old.

(In open court)

THE COURT: The plaintiff is 61 years old. There was proof in the record.

(At the side bar)

MR. CARR: I believe that takes care of it.

THE COURT: What is his life expectancy?

MR. LEVINE: His life expectancy is 14 years.

THE COURT: And his work expectancy?

MR. CARR: three and a half years.

MR. LEVINE: Four years.

(In open court)

THE COURT: In that connection, his work expectancy is three and a half years, his life expectancy

is 14 years.

All right, you may retire now.

(Two United States Marshals were sworn.)

(At 12.40 p.m. the jury retired to deliberate on a verdict.)

(At 4.53 p.m. the jury returned to the courtroom.)

THE CLERK: Jurors please answer present as your names are called.

(Jury roll called -- all present.)

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes.

THE CLERK: What is that verdict?

THE FOREMAN: In favor of the plaintiff, $18,100.

THE COURT: $18,100?

THE FOREMAN: Yes.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it now stands recorded. You say you find for the plaintiff in the amount of $18,100 and so say you all.

THE COURT: Thank you very much for your careful attention to this case. You took my instructions and

talked it out. You are excused now until tomorrow morning at 9.30. Report to Room 109.

(Jury discharged)

MR. CARR: May I have ten days for a post trial motion, your Honor?

THE COURT: Yes.

MR. CARR: Thank you.

- - -

REPORT OF INJURY DATED MARCH 10, 1973

ILLNESS ☐
REPORT OF INJURY ☒

investigation 3-10-73

SSEL S/S CARIBE TEXAS CITY DATE 10 MAR, 1973

LL NAME BALECHA, Frank Dacusin ADDRESS #929, 154 W. 70th St, New York, New York

TING Stwds Utility WAY $430.11 /mo. Z # 561 475 SS# 576-09-6742 BORN 3/26/12

XT OF KIN Dolores Balecha RELATIONSHIP Wife

DRESS #929, 154 W. 70th St, New York, New York NUMBER OF DEPENDENTS 2

E-EMPLOYMENT PHYSICAL yes ☒ no ☐ DOCTOR M.M.U. Doctor, New York DATE 19 DEC, 1973

RIGINAL PORT OF ENGAGEMENT ~~HOUSTON~~ Galveston, Texas DATE 1 DEC, 1970

GNED PRESENT ARTICLES foreign ☐ coastal ☒ PORT New York DATE 2 JAN, 1973

MPLOYMENT TERMINATED ON Still employed PORT ____ REASON ____

ISPOSITION OF PERSONAL EFFECTS ____

ATE OF ILLNESS ☐ INJURY ☒ 8 MAR, 1973 TIME 1600 Approx. AREA OF VESSEL Door to chill box refer.

REPORTED TO A. N. Gordon, C/M DATE 8 MAR, 1973 TIME 1615 Approx.

NATURE OF COMPLAINT End of little finger of left hand badly cut on hasp of door.

TREATED BY Issued Master's Certificate. LOST TIME yes ☐ no ☒ PERIOD ____

STATEMENT (MAN SHOULD STATE CAUSE OF INJURY OR REASON FOR ILLNESS INCLUDING PAST HISTORY.)

I was coming out of the chill box with some vegetables for supper. I set the basket of vegetables down and turned around to close the chill box door. When I reached to grab the door which started to move because of the ship rolling I had to grab the hasp. I pushed the door to but the ring part of the hasp caught my finger.

SIGNED Frank D Balecha

WITNESSES – NAME, RATING AND ADDRESS (SUBMIT A SIGNED STATEMENT BY EACH LISTED)

1 ____
2 ____
3 ____
4 ____
5 ____
6 ____

Report of Injury Dated March 10, 1973

INVESTIGATION REPORT

(THIS SECTION TO BE COMPLETED WHENEVER ANY ACCIDENT OR INJURY IS REPORTED)

WHAT WAS INJURED PERSON DOING AT TIME OF ACCIDENT INCLUDING EQUIPMENT INVOLVED Man was closing door to chill box after coming out with a basket of vegetables.

WHAT UNPLANNED OCCURRENCE CAUSED INJURY Man caught finger between hasp of door and fastening ring on bulkhead as he pushed door to.

WHAT DID INJURED OR ANOTHER PERSON DO OR FAIL TO DO WHICH CAUSED ACCIDENT Man was holding door by hasp rather than door handle and forget to pull hand away as door closed.

WHAT IS BEING DONE TO PREVENT A REPETITION OF THIS ACCIDENT Stewards Department personnel warned about working around the heavy refer doors and about necessity to keep hands clear of anything except door handles.

GNATURE OF PREPARING OFFICER Harry L Moore, Jr.

GNATURE OF OFFICER ON WATCH _____ SIGNATURE OF MASTER D H Mebane

ORM 654

OPINION OF MACMAHON, D.J. DATED JANUARY 7, 1974

B V

FILED
U.S. DISTRICT COURT
JAN 8 11 15 AM '74
S.D. OF N.Y.

A

#40184

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK D. BALECHA,

Plaintiff,

-against-

UNION CARBIDE CORPORATION,

Defendant.

72 Civ. 4868-LFM

MEMORANDUM

FILED
JAN 8 1974

MacMAHON, District Judge.

Defendant, in this seaman's action for personal injuries, moves under Rule 59, Fed.R.Civ.P., for a new trial following a two-day jury trial and a verdict in favor of plaintiff in the amount of $18,100. The case was the perennial slip and fall accident.

On direct examination, plaintiff testified that while carrying a pail of garbage through the mess room, he slipped on a wet deck, fell against a bulkhead and injured his left shoulder. There was substantial evidence that the mess room refrigerator was defective and that for sometime water had been leaking from it onto the deck.

Opinion of MacMahon, D.J. Dated January 7, 1974

After the accident, plaintiff spent a period of time under treatment by the United States Public Health Service Hospital but later returned to duty. Shortly thereafter, he sustained a second injury fracturing his finger, when, due to numbness of his injured shoulder, he was unable to keep a five-hundred pound chillbox door from swinging shut on his hand.

Defendant grounds this motion on a contention that the court abused its discretion in curtailing and finally terminating defense counsel's cross-examination of plaintiff before he had an opportunity to cross-examine about the second injury. A motion for a new trial is also addressed to the discretion of the court.[1]

It appears from the record as a whole that defense counsel was given more than an adequate opportunity to cross-examine plaintiff with respect to both accidents. Nevertheless, and despite repeated warnings by the court from the start of the trial to present this simple case within one day, defense counsel persisted in ignoring the court's directions with prolix and often pointless cross-examination. As a result, it was necessary to continue the trial through the entire morning of the

second day, which, as counsel were fully advised from the outset, interfered with the trial of the next case scheduled to commence that morning.

Nevertheless, and despite further warnings by the court to progress with his cross-examination because the jury had been drawn in the next case and all parties were present and prepared to proceed, defense counsel persisted in wasting his time with prolix and pointless cross-examination of plaintiff until the court was left with no alternative but to direct counsel to limit his cross-examination of plaintiff to an additional five minutes, which was patently more than sufficient time to inquire about the chillbox door closing on his finger. Despite this clear and final warning, defense counsel persisted in ignoring the court's directions with further pointless questions until we were forced to call a halt.

A trial judge acts completely within his discretion in curtailing and finally terminating cross-examination after an attorney, despite repeated and clear warnings to progress with his cross-examination, persists in continuing beyond reasonable time limits set by the court.[2]

Opinion of MacMahon, D.J. Dated January 7, 1974

No court, trial or appellate, can handle its public business without placing reasonable time limitations on the presentation of cases. This is especially necessary in a trial court where almost every trial requires the assembling of at least thirty, and very often as many as fifty, people. That cannot be accomplished without giving reasonable notice to all concerned. Yet, because so many cases settle at the last minute and because criminal cases are entitled to a statutory priority, it is not practicable in this congested court to set days certain for civil trials without causing substantial and unproductive gaps in trial calendars with all the delay and denial of justice which would result. Because of this, it has always been our practice to schedule civil trials one to follow another in the order listed in the New York Law Journal. Counsel are so advised at the first pretrial conference. That practice makes it necessary for the court to make experienced estimates of the time required for a full and adequate presentation of a case in order to give reasonable notice to the jury clerk, to counsel in the next case and to the parties and witnesses.

Here, based on long experience, we made such an estimate before the trial, and counsel were so advised both at pretrial and again at the start of the trial. The reasonableness of our estimate was confirmed by the simplicity of the accidents and injuries described by plaintiff on his direct testimony. Accordingly, at the conclusion of his direct testimony, telephonic notice for trial on the next morning was given to all concerned in the next case. But when all appeared on the following morning, this case was still poking along. Nevertheless, at our suggestion, counsel in the next case drew a jury in another courtroom and, that accomplished, all were obliged to wait until afternoon to enable the court to submit this case to the jury before the lunch hour. As we have noted, both counsel in this case were made fully aware of the situation.

In the circumstances, we fail to see an abuse of discretion in curtailing counsel's cross-examination. Surely, defense counsel had no license to monopolize the time of the court nor to ignore its clear directions. Reasonable time limitations were clearly ignored and exceeded here, and it was the plain duty of the court to terminate defense counsel's cross-examination.[3]

Opinion of MacMahon, D.J. Dated January 7, 1974

There is no showing that the verdict was excessive or unreasonable in any way. Moreover, plaintiff did not even claim, much less offer any evidence showing any permanent injury to his finger. The relative insignificance of the second accident is further demonstrated by the fact that defense counsel did not even cross-examine either of plaintiff's medical witnesses about the injury to plaintiff's finger.

Finally, the granting of a new trial lies within the discretion of the court. To grant one here would not only reward defense counsel for ignoring the court's directions but penalize plaintiff by subjecting him to the expense and risk of a second trial.

We think it plain, under all of the circumstances, that even if we erred in terminating cross-examination of plaintiff, the error was harmless.[4]

Accordingly, the motion for a new trial is in all respects denied. SO ORDERED.

Dated: New York, N. Y.
January 7, 1974

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

Opinion of MacMahon, D.J. Dated January 7, 1974

Balecha v. Union Carbide Corp. 72 Civ. 4868-LFM

FOOTNOTES

1 Compton v. Luckenbach Overseas Corp., 425 F.2d 1130 (2d Cir.), cert. denied, 400 U.S. 916 (1970).

2 United States v. Crosby, 294 F.2d 928, 944 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962); Harris v. United States, 371 F.2d 365 (9th Cir. 1967); Sykes v. United States, 373 F.2d 607, 610-12 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967); Foster v. United States, 282 F.2d 222, 224 (10th Cir. 1960).

3 United States v. Crosby, supra, 294 F.2d at 944.

4 Rule 61, Fed.R.Civ.P.; 28 U.S.C. § 2111; United States for the Use and Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1083 (2d Cir. 1970); Shaw v. Scoville, 369 F.2d 909, 911-12 (2d Cir. 1966).

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

BALECHA,
Plaintiff-Appellee,

against

UNION CARBIDE CORP.,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 28th day of May 1974 at 299 Broadway M, New York

deponent served the annexed Appellant's Appendix upon

~~Joseph Friedman~~
Joseph Friedberg-Attorney for Plaintiff-Appellee

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

James Steele
Print name beneath signature

JAMES STEELE

Sworn to before me, this 28th day of May 1974

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0413950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975